

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF  
AND  
APPENDIX**



# 75-2056

To be argued by  
FREDERICK A. PROVORNY

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-2056

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UNITED STATES OF AMERICA ex rel. ALTON CANNON,

Appellee,

-against-

HAROLD J. SMITH, Superintendent,  
Attica Correctional Facility,  
Attica, New York,

Appellant.

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Appeal from the United States District  
Court for the Western District of New York

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BRIEF AND APPENDIX FOR APPELLEE

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Docket No. 75-2056

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UNITED STATES OF AMERICA ex rel. ALTON CANNON,  
Appellee,

-against-

HAROLD J. SMITH, Superintendent,  
Attica Correctional Facility,  
Attica, New York,

Appellant.

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BRIEF AND APPENDIX FOR APPELLEE

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INTRODUCTION

The Superintendent of Attica Correctional Facility (the "Superintendent") appeals from a judgment of the United States District Court for the Western District of New York (Curtin, Ch. J.) granting a writ of habeas corpus releasing Alton Cannon ("Mr. Cannon") from custody unless the Superintendent commences proceedings within 30 days to afford Mr. Cannon a new trial. Upon a previous appeal to this Court by Mr. Cannon, the case was remanded to the District Court for

a further Wade hearing. United States ex rel. Cannon v. Montanye, 486 F.2d 263 (2d Cir. 1973), cert. denied sub nom. Cannon v. Smith, 416 U.S. 962 (1974). The judgment appealed from is the result of that further Wade hearing.

#### QUESTIONS PRESENTED

1. Whether the remand of this case for a further Wade hearing permitted the District Court to decide the ultimate issue whether Mr. Cannon's right to due process under the Fifth and Fourteenth Amendments was violated by the introduction at trial of testimony by the complainant identifying Mr. Cannon in court as her assailant and stating that she had previously identified him as her assailant at a lineup.

2. Whether the findings of fact and conclusions of law of the District Court after the further Wade hearing were correct when made (a) with reference to guidelines set forth in the previous opinion of this Court for determining if the lineup in question was impermissibly suggestive and created a substantial likelihood of irreparable misidentification, and (b) on the basis of an evaluation of the credibility and demeanor of one police officer who had been present

at the lineup held almost six years before, and the only witness called by the Superintendent despite the availability as witnesses of three other police officers and the complainant herself.

3. Whether the introduction at trial of testimony by the complainant identifying Mr. Cannon as her assailant violated substantial constitutional rights of Mr. Cannon when her opportunity to observe her alleged assailant at the time of the alleged crime was minimal and impaired by darkness and recent consumption of alcohol, and when she selected Mr. Cannon five days after the alleged crime at a lineup found to be impermissibly suggestive.

THE PREVIOUS OPINION  
OF THIS COURT

Immediately preceding the commencement of trial in the instant case on January 6, 1969, the trial judge conducted (i) a Huntley hearing to determine the admissibility of certain oral and written statements attributed to Mr. Cannon and (ii) a Wade hearing to determine the admissibility of any testimony by the complaining witness identifying Mr. Cannon as her assailant. At the conclusion

of the Huntley hearing, the judge suppressed all written statements attributed to Mr. Cannon on the ground that Mr. Cannon had requested a lawyer on two occasions before making the first such statement (Tr. 95, 96)\*. However, the judge held admissible oral admissions pertaining to the instant case, attributed to Mr. Cannon by Detective William Mahoney and allegedly obtained before any written statements had been taken (Tr. 100).

The evidence at the Wade hearing dealt only with the conduct of a lineup held five days after the alleged attack. At the end of the Wade hearing, the judge held that the lineup was not impermissibly suggestive and denied a motion by counsel for Mr. Cannon to suppress any lineup and in-court identifications by the complaining witness (Tr. 130-31). The judge never reached the question whether the lineup created a substantial likelihood of irreparable misidentification.

On the previous appeal to this Court (Judges Lumbard, Friendly and Feinberg), Mr. Cannon challenged

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\* References denominated by "Tr." are to the record of the Huntley hearing, to the first Wade hearing and to the trial, conducted on January 6-10, 1969 (Exhibit 1 to the Record on Appeal). References denominated by "A." are to Appellant's Appendix in the instant appeal. References denominated by "App." are to the Appendix for Appellee [Mr. Cannon] in the instant appeal.

the admissibility of the identification testimony (the issue to which the present appeal relates). He also challenged the admissibility of the alleged oral admissions on the ground, inter alia, that at the Huntley hearing the prosecution had failed to sustain its heavy burden of proof under Miranda v. Arizona that Mr. Cannon had waived his right to counsel. Mr. Cannon also challenged the revelation by the prosecution during its case-in-chief at trial of the existence and contents of a suppressed typewritten statement, ostensibly to rehabilitate one of its detective-witnesses.

On October 19, 1973, this Court (Judge Friendly dissenting in part) held that the alleged oral admissions had been properly received into evidence and applied Harris v. New York, 401 U.S. 222 (1971) retroactively to conclude that the use at trial of the suppressed typewritten statement by the prosecution did not violate due process.\*

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\* In the event this Court concludes that the judgment presently appealed from should be reversed, Mr. Cannon respectfully requests reconsideration of so much of the previous decision of this Court (a) as sanctioned the admission of testimony revealing the existence and contents of the suppressed typewritten statement as part of the prosecution's direct case and the trial judge's instructions to the jury concerning such testimony, in light of Harrison v. United States, 392 U.S. 219 (1968), People v. Spencer, 66 Cal. 2d 158, 424 P. 2d 715, 57 Cal. Rptr. 163 (1967) (cited and quoted with approval in Harrison), and Michigan v. Tucker, 417 U.S. 433 (1974), and (b) as determined that the alleged oral admissions were properly received in evidence. See, e.g., United States v. Fernandez, 506 F.2d 1200, 1203-4 (2d Cir. 1974); Johnson v. Cadillac Motor Car Co., 261 F. 878, 886 (2d Cir. 1919); 1B J. Moore, Federal Practice ¶¶ 0.404[1], [4], [10] (2d ed. 1974).

However, with respect to the admission of the identification testimony of the complaining witness, this Court concluded, pursuant to 28 U.S.C. § 2254(d)(3), that the "material facts were not adequately developed at the State court hearing". 486 F.2d at 268. Accordingly, the case was remanded to the District Court to conduct a further Wade hearing, or, in the alternative, "to hold the case in abeyance so as to allow the state tribunal to oversee such proceedings." Id.

Judge Friendly, in his separate opinion, stated that

"[t]his is the rare state prisoner habeas appeal where there is reasonable doubt whether petitioner committed the crime." Id.

Several months later, Judge Lumbard expressed the same conclusion, stating in a concurring opinion in another state habeas case that of the "several thousand such petitions" he has reviewed as a judge, the instant case was one of "only two or three where a claim of innocence could be seriously advanced." Ralls v. Manson, 503 F.2d 491, 494 & n.1 (2d Cir. 1974).

A petition for a writ of certiorari was filed on behalf of Mr. Cannon seeking review of the issues not remanded by this Court. The Attorney General filed a brief opposing the petition primarily on the ground that the judgment

was interlocutory by virtue of the remand and the petition could be rendered moot if the District Court issued a writ of habeas corpus. On April 22, 1974, the petition was denied, Justices Douglas, Brennan and Marshall dissenting. 416 U.S. 962.

#### THE JUDGMENT APPEALED FROM

The further Wade hearing was conducted by Chief Judge Curtin on July 12, 1974. At the conclusion of the hearing, Chief Judge Curtin requested memoranda from counsel.\*

The Order and Judgment appealed from was entered by the District Court on February 20, 1975. It was accompanied by an opinion by Chief Judge Curtin which is reported at 388 F. Supp. 1201 (W.D.N.Y. 1975). A notice of appeal was filed on March 18, 1975. With the consent of the Attorney General and the District Attorney of Monroe County (the "District Attorney"), Mr. Cannon has been enlarged on his own recognizance pending review and has been granted leave to proceed on this appeal in forma pauperis.

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\* Although the District Attorney of Monroe County was given notice of the hearing (App. 10), only the Attorney General appeared at the further Wade hearing on behalf of the Superintendent. The letter, dated August 26, 1974, submitted by the Attorney General in lieu of a brief, is reproduced as Addendum A to this Brief.

## STATEMENT OF FACTS

### The Circumstances Surrounding The Alleged Rape

Mr. Cannon, at the time of his trial a 22-year-old, semi-literate Negro with no record of prior convictions, was convicted on January 10, 1969 of the first-degree rape of Mrs. Shirley Rippel, a white woman then 20 years old. He was given an indeterminate sentence of 6 years, 8 months-to-20 years in prison. The incident for which Mr. Cannon was convicted allegedly occurred in downtown Rochester, New York, between 12:15 and 12:45 A.M. on Saturday, August 31, 1968.

Mrs. Rippel testified at trial as follows: She, her husband, and other relatives went to Helfer's Bar and Grill in downtown Rochester on the night of August 30, 1968 (A. 69-70, 82-83). She consumed three glasses of beer there (A. 83), and she and her husband continued there an argument which had started at home (A. 70, 84). She left the bar alone, angry and upset, at approximately midnight (A. 83-84, Tr. 197-98) and started to walk to her home, a considerable distance away (A. 85). At approximately 12:15 A.M., she first saw a man, whom she said was Mr. Cannon, on the opposite side of the street in front of the Medical Arts Building (A. 87). At the same

time, she observed an automobile parked "right at the curb next to me" with five or six "kids" in it (A. 87-88). She next saw the man who had been across the street about five minutes later, still across the street (which is two lanes wide) at a corner filling station (A. 90). Although the station was closed, she could see him because the pump lights were on (A. 73, 91). This man walked through the filling station in a direction away from her (A. 91).

A minute or two later, while she continued walking down the same street toward the old East High School, somebody grabbed her from behind (A. 92). During this interval, she had neither seen nor heard anybody behind her (A. 74). When she was grabbed, she turned her head and glimpsed the clothing of her assailant (notably a green shirt), but at no time did she see his face (A. 93). She said that her assailant held a knife at her neck.\* She engaged in conversation with him and did not scream (A. 93) although there were houses on the other side of the street (A. 94), and she "somehow" was gotten to the back of the school and placed on the ground (A. 94). Her assailant remained behind her, removed her skirt, put it over her head, removed her undergarments and penetrated her (A. 74). While the rape was in progress, she was "too scared" to remove the skirt from her head (A. 94).

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\* No knife was introduced in evidence at the trial.

Mrs. Rippel reported the rape to the police the same night, describing her assailant to them as a male Negro wearing a green shirt, dark pants, who was "on the thin side"--i.e., "he wasn't heavy." (A. 97).

A medical examination of Mrs. Rippel was conducted three hours after the alleged incident. The doctor who had examined Mrs. Rippel testified that although Mrs. Rippel did not appear to be in distress, she was "quite disoriented as to time and events" (Tr. 187).

Lieutenant Reiss's Instruction  
To Mr. Cannon That He Wear A  
Green Upper Garment

Lieutenant George Reiss testified at the pre-trial Huntley hearing that while investigating another incident he first noted Mr. Cannon on the street in front of the Richford Hotel at approximately 3:30 A.M. on September 5, 1968--five days after the alleged rape (Tr. 8, 14-17). At that time, Mr. Cannon was wearing a green shirt (Tr. 19). Lieutenant Reiss had never seen Mr. Cannon before (Tr. 16, 212). After permitting Mr. Cannon to proceed to his room in the hotel (Tr. 17), Lieutenant Reiss returned to the Public Safety Building and read thoroughly the files relating to three sex incidents (including the alleged rape of Mrs. Rippel) (Tr. 9, 18-19, 204). In two of these complaints

the assailant was described as wearing a green shirt (Tr. 18-19). Lieutenant Reiss was not in charge of investigating any of these cases (Tr. 18) and had not talked to Mrs. Rippel prior to this examination of the files (Tr. 214). Nonetheless, Lieutenant Reiss concluded that "the more I read them the more it fit the description of Alton Cannon." (Tr. 9).

At approximately 5:00 A.M. the same day, Lieutenant Reiss and one or two other detectives returned to Mr. Cannon's hotel room without a warrant (Tr. 9, 19-20, 214-15). Lieutenant Reiss testified that he then told Mr. Cannon that "there had been a serious accusation placed against him [and that he] fitted the description of a person on an assault" (Tr. 20; see Tr. 204) and requested him to come downtown (Tr. 20, 216-17). Thereupon, when Mr. Cannon started to dress, Lieutenant Reiss instructed him to put on a green sweater instead of a different upper garment he was about to put on (Tr. 87, 283). Lieutenant Reiss so testified (Tr. 216):

"I told him to put the same clothing on that I talked to him before, the hour before that. And at that time he had a green Ban-lon shirt on."

Lieutenant Reiss turned Mr. Cannon over to Detectives William Mahoney, Daniel Funk and George McDonald at approximately 8:00 A.M. (Tr. 218). Thereafter, he

"went back to file [his] reports, check [his] platoon" and remained at the Public Safety Building until noon (Tr. 218).

#### The First Wade Hearing

At the first Wade hearing on January 6, 1969, Mrs. Rippel testified as follows: On September 5, 1968, she had been asked to appear at the Public Safety Building for the purpose of making an identification of a possible suspect (Tr. 104). Accompanied by Detective William Mahoney, she was taken into a room with a one-way mirror (Tr. 105) and, after looking over the five men in the lineup, identified Mr. Cannon (who was standing at the far right of the group) as the man who had raped her (Tr. 104, 105). She testified that Mr. Cannon was wearing at the lineup a green sweater and light pants \* (Tr. 108). She did not recall the color of the clothing of the other four men (Tr. 108).

Detective Mahoney then testified at the first Wade hearing that the lineup was conducted in back-to-back rooms separated by a one-way mirror (A. 61). There were five men, all Negroes, in the lineup (A. 61, 62). He testified on direct examination (A. 62):

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\* Mrs. Rippel testified later at trial that Mr. Cannon was wearing at the lineup a green shirt and dark pants (A. 98).

"They were all of within an inch or two or approximately the same height and approximately the same in weight and one or two approximately the same in dress."

Detective Mahoney testified that Mrs. Rippel identified Mr. Cannon as her assailant (A. 62-63).

On cross-examination, Detective Mahoney testified that, after having been with Mr. Cannon since he had started interrogating him (A. 64-65), he took Mr. Cannon to the lineup room and then went with Mrs. Rippel to the other side of the one-way mirror (A. 65). The other police officers present at the lineup were Detectives Daniel Funk and George McDonald and they were situated with the five participants (A. 65). Detective Mahoney then stated that Mrs. Rippel looked at the men for "[p]ossibly forty-five seconds to a minute" and then identified Mr. Cannon as her assailant by pointing to him and stating "[t]hat's the man right there." (A. 66). He also stated that no directions were given to Mr. Cannon other than to stand up and face the mirror (A. 66), that these directions were given by the other detectives, and that Mr. Cannon did not utter any words himself (A. 66).

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\* The term "approximately the same in dress" was never amplified at any of the prior proceedings to imply that it meant that one or more of the stand-ins at the lineup was also wearing a green upper garment. This failure of the prosecution to detail the color of the upper garments worn by all of the participants in the lineup was one of the reasons why this Court found that "the material facts were not adequately developed at the State court hearing". 486 F.2d at 268.

### The Further Wade Hearing

The further Wade hearing ordered by this Court was held on July 12, 1974. The only witness was Detective Mahoney. On direct examination, he testified that five men, all black, had been in the lineup (A. 22); that the four stand-ins were men who had been arrested but not yet arraigned, selected in the jail downstairs from 40 or 50 young men of the same age-group, within an inch of Mr. Cannon's height and ten pounds of Mr. Cannon's weight, wearing civilian clothing, one of whom was "wearing a green sweater similar, in fact, almost identical, to the one that Alton Cannon wore." (A. 23-24); that Mrs. Rippel, Lieutenant Reiss and Detective Daniel Funk were present (A. 22); and that Mr. Cannon was standing in the No. 5 position at the extreme right (A. 24). Detective Mahoney also stated that at the lineup Mrs. Rippel identified Mr. Cannon by his face as her assailant (A. 25). Most of Detective Mahoney's remaining testimony on direct examination is quoted in the District Court's opinion. 388 F. Supp. at 1203.

On cross-examination, Detective Mahoney stated that on July 11, 1974 he had looked at his trial testimony but it did not refresh his recollection (A. 26-27), and that he had not reviewed his testimony at the first Wade hearing (A. 36). He stated that he had no notes or files

to which he could refer (A. 27). Detective Mahoney testified that he "recall[ed] the case very vividly" because "this subject in particular, Cannon, I'm familiar with him" (A. 28). Therefore, his testimony at the further Wade hearing was based on his memory of the lineup which had occurred almost six years earlier (A. 27-28). He testified that of the 40 to 50 young men in the jail, he had found only one who had a green sweater (A. 29, 39). At first he testified that Lieutenant Reiss and Detective Funk arranged to select the stand-ins and bring them upstairs (A. 29), but subsequently indicated that he himself had selected them and brought them to the lineup room (A. 29, 33).

Although Detective Mahoney stated that "I really go more on the material" (A. 31), when asked about the fabric of which Mr. Cannon's upper garment was made, he said, "I don't know if it was a knit or cotton or what" (A. 30). He "couldn't say" anything about its texture (A. 30). He "couldn't say for sure" whether the upper garment worn by Mr. Cannon had long or short sleeves (A. 31); "can't say" whether it opened in the front (A. 31); and "just can't recall" whether it was a pullover (A. 31). He "couldn't say" whether it had a high neck (A. 32); and "couldn't recall" whether it was worn outside or inside the trousers (A. 32).

When asked to describe the garment worn by the one other man, he stated "I don't know, it was just green." (A. 32). Although he had stated that "[f]or some reason [Mr. Cannon's upper garment] struck me as not being what I would call a shirt" (A. 32), he stated that "they were shirts that were popular at the time" (A. 33). When asked about the hue of the green sweater allegedly worn by the other individual, Detective Mahoney stated: "I don't recall. It was a sharp green." (A. 33); and, although Detective Mahoney testified that he "recall[ed] . . . very vividly" that the sweater worn by the other individual was "almost identical to the one Cannon was wearing" (A. 33), he also testified he did not recall whether this garment was a pullover (A. 34) and had not taken specific note of the quality of the man's upper garment or the length of the sleeves (A. 34). He also stated that "nothing was put down on paper in that regard." (A. 34).

Upon being questioned by Chief Judge Curtin, Detective Mahoney stated that in 1968 the only record made of participants in lineups consisted solely of their names and the positions in the lineup they occupied (A. 37). No photographs were taken of lineups, and no written record was made of the participants' dress, height, weight or

other characteristics (A. 37). In addition, Detective Mahoney testified that the Rochester Police Department had no supplies of clothing (A. 29) and that he could not obtain green garments from other sources before holding the lineup (A. 30).

Detective Mahoney also testified that he has "done quite a few" lineups at the Rochester Police Department (A. 28) and attends an average of 6 or 8 per year (A. 36). When reminded that during an early portion of this cross-examination he had stated that his recollection was very clear as to what had happened at the lineup, Detective Mahoney replied (A. 45):

"My lineup procedures are practically the same, as far as the identification goes. I am going to make sure the witness identifies the person she does identify by his face, not by any garment he wears or by his size, and I know Mrs. Ripple [sic]\* was asked by me if she was sure that was the man, and she said yes."

He also stated that he was assisted in his testimony at the further Wade hearing by being aware of his invariable practice in conducting lineups (A. 46); and then testified (A. 46-47):

"Q. Well, any case where you have a positive identification, you have an identification by the face?

"A. That is correct."

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\* Throughout the transcript of the further Wade hearing Mrs. Rippel's name is misspelled as "Ripple." In all subsequent quotations from this transcript herein, the spelling of her name has been corrected.

Immediately thereafter, upon being asked: "Are you aware that in this case Mrs. Rippel was unable to observe the face of her assailant at the time of the crime?", Detective Mahoney stated that he was not (A. 47).

Detective Mahoney testified that Mrs. Rippel was in the observation room for "probably five to ten" and "possibly" fifteen minutes (A. 35, 41). When asked to reconcile this testimony with his testimony at the first Wade hearing that Mrs. Rippel had looked at the men for "not over a minute, possibly forty-five seconds to a minute" (A. 66), he stated (A. 41):

"The way I interpreted the question, it said each man, each man. Each man has to step forward, say his name, turn left, turn right and step back."

In answer to a question by Chief Judge Curtin during direct examination, Detective Mahoney had stated (A. 25):

"I went back to the other side of the lineup to ask her if she could identify anybody in the lineup . . . . I returned to the other room on the other side of the mirror and I had Cannon step forward . . . . I returned him to the lineup, and went back and again spoke to Mrs. Rippel . . . ."

Immediately thereafter he testified that "in order to talk to the witness, who was looking through the one-way mirror at the subjects, you have to go out into the hall, into another room--another doorway" (A. 25-26). He later testified on cross-examination that he was in the observation room with Mrs. Rippel part of the time (A. 35) and stated

that he had moved between the lineup room and the observation room (A. 35).

Also, when Detective Mahoney was later shown his testimony from the first Wade hearing in which he did not mention Lieutenant Reiss as one of the officers present at the lineup, he insisted that Lieutenant Reiss had been there (A. 48). He believed that Lieutenant Reiss may have been with Mrs. Rippel and stated that Lieutenant Reiss was not in the lineup room (A. 49). He later stated that "Lt. Reiss was either in the hall or in the room with Mrs. Rippel. I'm not sure." (A. 51). Upon being questioned by Chief Judge Curtin, Detective Mahoney said that Detective Funk was "in and out . . . from one room to another . . . in and out of both rooms" (A. 51).

When first questioned by Chief Judge Curtin, Detective Mahoney had stated that the persons attending the lineup consisted of the subjects, Mrs. Rippel, Lieutenant Reiss, Detective Funk, himself and "no one else" (A. 37). On cross-examination, after being shown his testimony at the first Wade hearing, he added Detective McDonald (A. 48). When Chief Judge Curtin later asked him whether Detective McDonald was in or out, he replied "[h]e was there part of the time." (A. 51).

After both sides had finished examining Detective Mahoney, Chief Judge Curtin ascertained from him that Lieutenant Reiss and Detective Funk were still members of the Rochester Police Department, and that Detective McDonald, although retired from the Police Department, was still living in Rochester (A. 53). Although counsel for the Superintendent indicated that he did not know whether Mrs. Rippel was still living (A. 53), Chief Judge Curtin was advised that she was alive and living in the Rochester area (A. 54). None of these individuals was produced at the further Wade hearing.

#### ARGUMENT

- I. This Court's Mandate Required the District Court to Ascertain Whether the Introduction of Mrs. Rippel's Identification Testimony Violated Due Process.

On this appeal, the Superintendent has argued "[t]he only issue on remand was the clothing worn by the subjects other than Cannon." Brief for Appellant at 9. However, it is clear from the previous opinion of this Court that the mandate to the District Court called for a determination as to whether the introduction at trial of Mrs. Rippel's testimony identifying Mr. Cannon in court and at the lineup as her assailant violated due process. If the facts adduced at the further Wade hearing led to a finding that the lineup was impermissibly

suggestive, the "totality of circumstances" would make it manifest that there was an unusually great likelihood of irreparable misidentification, thus making the introduction of her identification testimony a violation of due process. As discussed on page 4 of this Brief, the state judge at the first Wade hearing did not consider whether the lineup created any likelihood of irreparable misidentification.

In its previous opinion, this Court concluded its discussion of the identification issue as follows:

" . . . Under these circumstances, we decline to decide the ultimate issue of taint. Because 'the material facts were not adequately developed at the State court hearing,' 28 U.S.C. § 2254(d)(3), we remand to the district court to conduct a further Wade hearing, taking into account the factors which we have cited, or, in the alternative, to hold the case in abeyance so as to allow the state tribunal to oversee such proceedings." 486 F.2d at 268 (Emphasis added).

When placed in context with the discussion in Part II of the previous opinion of this Court, it is evident that this Court intended the District Court to decide the ultimate question of due process. It is erroneous to contend that the mandate was limited solely to a determination of the mediate fact of whether any of the other men had worn a green upper garment\* because, if the lineup was impermissibly suggestive, the ultimate issue of due process would then be left unresolved. The further proceedings on remand would thereby have been made a futile exercise.

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\* The ultimate objective of a Wade hearing under New York criminal procedure is to ascertain not merely whether a lineup was impermissibly suggestive but whether potential testimony "identifying the defendant as a person who committed the offense charged" should be suppressed or excluded because it "would not be admissible upon the prospective trial of such charge owing to an improperly made previous identification of the defendant by the prospective witness." N.Y. Crim. Proc. Law § 710.20(5) (McKinney 1971).

II. The District Court's Findings That the Lineup Was Impermissibly Suggestive and Created a Substantial Likelihood of Irreparable Misidentification Are Supported by the Great Weight of Evidence, and Its Conclusion That Due Process Was Violated By Introducing Any Evidence At All With Regard to Identification Is Supported by Established Principles of Law.

In rendering its findings and reaching its conclusions in accordance with the mandate of this Court, the District Court could properly consider not only the testimony adduced at the further Wade hearing itself but also the entire state-court record and the guidelines set forth in the previous opinion of this Court. Based upon a review of all the evidence and an evaluation of Detective Mahoney's demeanor and behavior at the further Wade hearing, the District Court concluded that "the inference of damaging suggestibility at the petitioner's lineup was not dispelled", 388 F. Supp. at 1203. and that "it was error to admit any testimony with regard to identification at all." Id. at 1204. The findings of fact below were correct, and the conclusions of law were faithful to established legal principles.

A. The Superintendent's Contention That the District Court Erroneously Shifted the Burden of Proof is Fallacious and Irrelevant.

Implicit in the decision by this Court to remand the instant case was the conclusion that Mr. Cannon had already made a prima facie showing that the lineup was impermissibly suggestive and that there was a substantial likelihood of irreparable misidentification.

Neither Chief Judge Curtin's opinion nor the record of the further Wade hearing suggests that the burden of persuasion was placed upon the Superintendent.\* Reduced to its essentials, the Superintendent's contention that Chief Judge Curtin improperly shifted the burden of proof is merely a disagreement with Chief Judge Curtin's evaluation of Detective Mahoney's testimony at the further Wade hearing and is based upon the Superintendent's assertion that such testimony established no "taint" at the lineup.

The fact is that Chief Judge Curtin evaluated the testimony after observing the behavior and demeanor of Detective Mahoney on the stand and thus acted within his discretion. This was a matter "specifically within the province of the district court". United States ex rel. Doblin v. Follette, 418 F.2d 408, 411 (2d Cir. 1969). It is particularly apposite to uphold Chief Judge Curtin's findings because this Court held on the previous appeal that "the material facts were not adequately developed at the State court hearing", declaring that one of the eight exceptions to 28 U.S.C. § 2254(d) applied.\*\* 486 F.2d at 268. Therefore, the findings made by

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\* Ironically, the Superintendent now maintains that the further Wade hearing was "not a de novo hearing, but a continuation of the state Wade hearing". Brief for Appellant at 6. Although the state judge at the conclusion of the first Wade hearing found that the lineup was not impermissibly suggestive, he clearly indicated that the prosecution had the burden of persuasion as to this issue (Tr. 130).

\*\* United States ex rel. Stanbridge v. Zelker, slip op. 2905, 2915 (2d Cir. April 15, 1975) (Docket Nos. 73-2504, 75-2009), cited by the Superintendent, is not in point because in Stanbridge this Court expressly declared that none of the exceptions to 28 U.S.C. § 2254(d) applied.

the trial judge at the end of the first Wade hearing were no longer entitled to a presumption of correctness.

A fair reading of the record of the further Wade hearing shows that Chief Judge Curtin merely stated that "the obligation is on the People to bring the witnesses" (A. 18), and that the Superintendent never objected. Chief Judge Curtin's statement was entirely appropriate in view of the fact that Mr. Cannon had already made a prima facie case. Indeed, under the circumstances, it was essential if the further Wade hearing was to be meaningful. Shortly before the further Wade hearing, the District Attorney indicated that he had no addresses for any of the other men in the lineup (App. 8). Mrs. Rippel, Lieutenant Reiss, and Detectives Mahoney, Funk and McDonald were either under the control of the District Attorney or had an affinity for the prosecution. Mr. Cannon himself could provide no additional information concerning the issues to be determined at the further Wade hearing because he had testified on cross-examination at trial that he knew nothing about the features of the other men in the lineup (Tr. 301-02).

B. The Evidence As A Whole Establishes Beyond Question That Any Burden of Proof Which Could Be Imposed on Mr. Cannon Has Been Sustained.

1. The record of proceedings prior to the further Wade hearing establishes prima facie that Mrs. Rippel's testimony identifying Mr. Cannon as her assailant violated due process.

In determining whether the introduction of testimony by Mrs. Rippel identifying Mr. Cannon as her assailant violated due process, the District Court had the state-court record before it. In addition, the District Court had the benefit of the conclusions reached by this Court in remanding the case after it had reviewed the same state record. This Court expressly found that Mrs. Rippel's testimony at trial "revealed that she had never seen her assailant's face" and that her observations were "understandably limited since she was assaulted at night on the street, grabbed from behind and raped with her skirt held over her head." 486 F.2d at 267. This Court also found that although at the first Wade hearing

"[Mrs. Rippel] could not recollect what the others had worn; she did, however, remember that [Mr. Cannon]-- like her attacker--had been wearing a green shirt . . ."

and that a conclusion that the lineup was impermissibly suggestive

"would be fortified by the indication of police complicity in arranging an unfair lineup." Id.

Most importantly, however, this Court concluded:

"If all were dressed in green the inference of undue suggestion would clearly fail. If one or two had on green shirts, the inference would weaken very considerably. On the other hand, if the inference remained, it would acquire great importance in a case where the victim's 'opportunity' . . . to view the criminal at the time of the crime' was limited, as appears to be the case here." Id. at 268. (Emphasis added)

In addition, Judge Friendly in his separate opinion found that

"At the time of the alleged rape the victim did not see her assailant's face; she caught only a glimpse of his clothing and noticed that he was wearing a green upper

garment. In direct testimony she claimed to have seen Cannon standing across the street from her while she was walking home and to have seen him walking through a gas station across from her shortly before she was attacked, but this was substantially weakened on cross-examination." Id. (Emphasis added)

The arguments of counsel during the state proceedings were also part of the record herein. On the direct appeal in 1969 of Mr. Cannon's conviction, the District Attorney--the Superintendent's present counsel--conceded on page 7 of his brief to the Appellate Division\* that:

"It was evident to the jury after defendant's cross-examination that the victim could not identify the defendant as her assailant; (178) therefore, the victim's testimony of her identification at the line-up had no value relative to the identification of her assailant and served only to bolster her testimony that it was this defendant who was seen minutes before walking in the same vicinity as the victim." (Emphasis added)

Casting the facts most favorably to the Superintendent would equate Detective Mahoney's statement at the first Wade hearing that one or two of the other men were "approximately the same in dress" (A. 62) with those men wearing green upper garments. Nonetheless, it is evident from the previous opinion of this Court that even under these circumstances the inference of impermissible suggestiveness was not destroyed. Accordingly, it "acquired great significance" because Mrs. Rippel was unable to observe her alleged assailant at the time of the crime. 486 F.2d at 268.

Therefore, prior to the introduction of any evidence at the further Wade hearing, Mr. Cannon had made a prima facie

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\* Exhibit 11 to the present Record on Appeal.

showing in this Court and in the District Court that the introduction at trial of Mrs. Rippel's testimony identifying him as her assailant in court and at the lineup violated due process.

2. Detective Mahoney's testimony at the further Wade hearing strengthened the inference that the lineup was impermissibly suggestive. Even if Chief Judge Curtin had accepted Detective Mahoney's testimony at the further Wade hearing at face value, the inference of impermissible suggestiveness arising from the record of the state proceedings was strengthened by that testimony, not dispelled. As this Court indicated, even if two other individuals had worn green upper garments at the lineup, the inference of impermissible suggestiveness, although weakened, would continue to exist. Detective Mahoney's testimony at the further Wade hearing indicated that only one other individual at the lineup had worn a green upper garment (A. 24, 39). Although the District Attorney now asserts that Detective Mahoney's testimony at the further Wade hearing showed that there was no "taint", the Attorney General, in his letter to Judge Curtin dated August 26, 1974, stated:

"... the inference of undue suggestion, although not clearly failing, remains weakened, nevertheless." Addendum A at 1. (Emphasis in the original)

In stating that only one, rather than two or more other individuals had been wearing a green upper garment, Detective Mahoney's testimony added strength to Mr. Cannon's case.

Because Mrs. Rippel could identify her alleged assailant solely through a glimpse of his upper garment, the inclusion in the lineup of only one other individual wearing a green upper garment rendered her "identification" analogous to the toss of a coin. The presence of one other participant who was wearing a green upper garment was pure happenstance; and the effect of his presence would be merely to reduce the probability of Mrs. Rippel's identifying Mr. Cannon at the lineup as her assailant from virtually 100% to roughly 50%.

Detective Mahoney's testimony at the further Wade hearing also strengthened Mr. Cannon's case in that it provided additional evidence of police complicity in arranging an unfair lineup. He testified that the Rochester Police Department did not maintain supplies of clothing (A. 29). Thus, no effort could have been nor was made to provide any of the other participants with green upper garments (A. 30). Lieutenant Reiss must have been aware of this fact when he directed Mr. Cannon at the hotel to put on the green sweater. However, he could not have known that any man resembling Mr. Cannon and wearing a similar green upper garment could be found to participate in a lineup. Thus, if none of the men available as stand-ins had been wearing green, the suggestive feature deliberately created by Lieutenant Reiss's direction to Mr. Cannon could not have been remedied.\*

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\* It is also surprising that in September 1968, more than one year after the Supreme Court's decision in United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967), no procedures had been instituted by the Rochester Police Department either to photograph or record essential characteristics about the participants in pre-trial lineups (A. 37) or to eliminate potentially suggestive influences.

Nothing in Detective Mahoney's testimony at the further Wade hearing assists the Superintendent in his belated assertion that Mrs. Rippel had an independent basis for identifying Mr. Cannon (Brief for Appellant at 5-6). Although Detective Mahoney testified that Mrs. Rippel at the lineup had identified Mr. Cannon by his face (A. 25), Chief Judge Curtin found this testimony unworthy of belief. 388 F. Supp. at 1203 n. 3. In 1969, the District Attorney conceded to the Appellate Division that Mrs. Rippel's identification of Mr. Cannon at the lineup "had no value relative to the identification of her assailant". This Court independently found that Mrs. Rippel's opportunity to view her alleged assailant was limited at best; and that she never saw his face. Mrs. Rippel's testimony at trial identifying Mr. Cannon as her assailant usurped the power which belonged solely to the jury to infer whether the man she had seen across the street was in fact her assailant or even Mr. Cannon.

Thus, even if Detective Mahoney's testimony at the further Wade hearing had been accepted in its entirety by the District Court and had not revealed the possible presence of other suggestive influences at the lineup, the determination by the District Court that the introduction of Mrs. Rippel's identification testimony at trial violated due process must be sustained.

C. Detective Mahoney's Testimony at the Further Wade Hearing Was of Doubtful Credibility.

The resolution of the ultimate issue of due process remanded to the District Court necessarily depended upon factual determinations to be made on the basis of the further Wade hearing. These determinations were made by Chief Judge Curtin after observing the demeanor of Detective Mahoney on the stand. This presents the classic situation for upholding the findings of fact of a district judge unless they are clearly erroneous. Fed. R. Civ. P. 52(a). See, e.g., United States ex rel. Diblin v. Follette, *supra*, 418 F.2d at 411. Certainly, this Court has upheld findings of fact by district judges based largely upon credibility where there has been far less support for those findings than in the instant case. See United States ex rel. Fitzgerald v. La Vallee, 461 F.2d 601, 604 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972). Accordingly, it is inappropriate for the Superintendent to ask this Court to second-guess Chief Judge Curtin's evaluation of Detective Mahoney's testimony.

In any event, the correctness of Judge Curtin's findings of fact and conclusions of law is abundantly demonstrated by reference to the transcript of the further Wade hearing.

It must be emphasized that Detective Mahoney stated that his recollection had not been refreshed by his examination on July 11, 1974 of his testimony at trial (A. 27); except for a possible reference to the lineup list, which was not produced and which allegedly contained only the names and positions of of the respective participants (A. 37), his testimony at the

further Wade hearing was based solely upon his memory (A. 27).

On the present appeal, the Superintendent contends that Detective Mahoney's lapses of memory were understandable given the passage of almost six years from the date of the lineup, and that the only recollection he would naturally retain of that event was his selection of one other individual wearing a green upper garment. However, Detective Mahoney sought to convey precisely the opposite impression at the further Wade hearing.

His testimony and demeanor on direct examination attempted to portray an extraordinary recall of details of the 5- to 15-minute lineup. The portions of his testimony quoted by the District Court (388 F. Supp. at 1202-03) reveal a witness with pat answers who obviously has had considerable experience in testifying. As noted above, Detective Mahoney stated on direct examination--for the first time in any of the proceedings--that at the lineup Mrs. Rippel had identified Mr. Cannon as her assailant by his face (A. 25; see 388 F. Supp. at 1203 n. 3). Indeed, Detective Mahoney testified that he "recall[ed] the case very vividly" (A. 28). However, Detective Mahoney's testimony on cross-examination was often oddly selective and uncertain. Cross-examination also revealed material contradictions between his testimony at the first and further Wade hearings, often causing him to assert that his testimony at the latter was the more accurate.

(1) Failure to Recall Features of Both  
"Almost Identical" Upper Garments

The District Court found that, although Detective Mahoney continued to insist that one other individual wore a green sweater almost identical to Mr. Cannon's, "he was short on specifics." 388 F. Supp. at 1203. The instances cited by the District Court and those set forth in the Statement of Facts herein (pages 15-16, supra) are illustrative.

(11) Inconsistent Statements at the First Wade Hearing.

Detective Mahoney testified at the further Wade hearing that he spent time in the lineup room, except when he left it to speak to Mrs. Rippel (A. 25-26, 35); that Detective Funk also "went from one room to another" (A. 50-51); and that Lieutenant Reiss was present at the lineup and may have been with Mrs. Rippel (A. 22, 29, 37, 47-49, 51). However, at the first Wade hearing, Detective Mahoney testified that he had been with Mrs. Rippel throughout the lineup (A. 65); that Detective Funk remained in the room containing the participants of the lineup (A. 65); and he omitted any reference to Lieutenant Reiss's presence at the lineup (A. 65).

Another inconsistency concerned directions he had allegedly given to Mr. Cannon. At the further Wade hearing, Detective Mahoney testified that he had gone back into the lineup room and personally directed Mr. Cannon to show his profile (A. 25), after which Mrs. Rippel indicated specifically that she identified Mr. Cannon as her assailant by his face (A. 25, 45). However, as pointed out to Detective Mahoney

on cross examination, he testified at the first Wade hearing that the only directions given to Mr. Cannon at the lineup were "just to stand up and face the mirror" (A. 43, 66), that these directions were given by the other detectives (A. 43, 66) and that Mrs. Rippel merely said "[t]hat's the one right there" (A. 42, 66).

Detective Mahoney insisted that his testimony as to these matters at the further Wade hearing was more accurate than statements he had made at the first Wade hearing almost six years before. Since memories dim with the passage of time\*, as even the Superintendent now agrees, it seems extraordinary that his new testimony at the further Wade hearing should be more accurate than his 1969 testimony.

(iii) Projection of Standard Lineup Practices to This Lineup

The District Court found that "Mahoney's 'standard lineup' practices were a source of some of his detail" and that his "insistence that the victim identified Cannon's face is the best example of this phenomenon." 388 F. Supp. at 1203 & n. 3. Detective Mahoney's testimony at the further Wade hearing is replete with statements reinforcing the accuracy of those findings. For example, he stated that Mrs. Rippel must have been present at the lineup for at least five minutes because

"[e]ach man has to step forward, say his name, turn left, turn right and step back" (A. 41),

and "[t]here would be no way you could run a lineup in less

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\* See, e.g., United States ex rel. Bisordi v. La Vallee, 461 F. 2d 1020, 1023-24 (2d Cir. 1972).

than five minutes." (A. 42). Moreover, he admitted that his procedure in conducting lineups does not vary--that in his experience witnesses always make positive identifications of suspects by their faces (A. 46-47), and that he will "make sure that the witness identifies the person by his face, not by any garment he wears" (A. 45). Yet even at the further Wade hearing, Detective Mahoney did not know that Mrs. Rippel had never seen the face of her alleged assailant (A. 47).

(iv) Detective Mahoney's Testimony Can Be Tested Against, and Refuted By, Documents and His Testimony in Other State-Court Proceedings Herein.

The credibility of Detective Mahoney's testimony at the further Wade hearing that one other individual had been wearing green at the lineup can be evaluated by his prior testimony at other proceedings in the instant case, and by documents. Thus, Detective Mahoney had a very vivid recollection of the instant case because "this subject in particular, Cannon, I'm familiar with him." (A. 28). Yet prior to the trial of the instant case, Mr. Cannon had no record of previous convictions. He had been incarcerated continuously from September 5, 1968 to and including the date of the further Wade hearing. Detective Mahoney's testimony on direct examination at trial makes it evident that he had never met Mr. Cannon before the morning of September 5, 1968 because he stated that, when he first saw Mr. Cannon that day, he "told [Mr. Cannon] who I was" (Tr. 223). Since Detective Mahoney at the further Wade hearing could not

recall that Detective McDonald was present in the lineup room (A. 37) until confronted during the latter part of cross-examination with his own testimony at the first Wade hearing (A. 47, 65), it is dubious, at best, that Detective Mahoney had more than a vague recollection of Mr. Cannon and the lineup in question.

Detective Mahoney obviously maintains an interest in sustaining Mr. Cannon's conviction. The transcript of the further Wade hearing shows a witness insisting that the most salient recollection of the lineup was that one other individual wore green (A. 33) although he never disclosed this recollection at the first Wade hearing. Yet even Mrs. Rippel did not have this recollection six years ago. If another participant had, in fact, worn an almost identical green sweater, it would be natural for Mrs. Rippel to have remembered him also when she testified at the first Wade hearing. Nevertheless, on cross-examination, Mrs. Rippel stated that she did not recall the color of the clothing worn by any of the other men in the lineup (Tr. 108; see 486 F.2d at 267).

The record in the instant case also furnishes documentary proof that Detective Mahoney had previously proffered erroneous testimony affecting substantial constitutional rights of Mr. Cannon and stubbornly held that such testimony was correct. The prime example is his testimony at the Huntley hearing and at trial--based solely upon four-month old memory

(Tr. 42, 230)--as to whether Mr. Cannon had requested a lawyer at the time the stenographic statement was taken from him.

Although the independently recorded stenographic statement itself contained Mr. Cannon's two unequivocal requests to Detective Mahoney for a lawyer, Detective Mahoney stubbornly maintained at the Huntley hearing that Mr. Cannon had stated--and the stenographic statement would show--that Mr. Cannon wanted a lawyer only when the case came up in court (Tr. 38-39).<sup>\*</sup> The relevant text of the stenographic statement itself was read to Detective Mahoney on cross-examination at trial, and he confirmed its accuracy (Tr. 235-37). Nevertheless, immediately thereafter--on redirect examination--Detective Mahoney reiterated that Mr. Cannon had stated that he wanted a lawyer only when the case came up in court (Tr. 238).

Detective Mahoney's testimony at the further Wade hearing showed, despite obstinacy, a lack of recollection as to the circumstances of the lineup as they had been portrayed at the first Wade hearing by him and by Mrs. Rippel. It also manifested a remarkable capacity for supplying new details at variance with all previous testimony--details which frequently were, and at other times suggested, hindsight justifications for his actions. Cf. Beck v. Ohio, 379 U.S. 89, 96 (1964). His testimony, in its attempt to display with certainty events

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<sup>\*</sup> The complete text of the stenographic statement refuting this testimony is located at Tr. 50-51.

which occurred almost six years before, was uncorroborated by photographs, documents or the testimony of others. It furnished no foundation for finding that the lineup had not been impermissibly suggestive. Accordingly, Judge Curtin's conclusion that

"on the basis of the testimony adduced at the hearing, the inference of damaging suggestibility at the petitioner's lineup was not dispelled. Detective Mahoney's testimony can only be characterized as equivocal." (388 F. Supp. at 1203-04)

is clearly supported by the evidence.

D. Detective Mahoney's Testimony Raised the Possibility of Other Suggestive Influences at the Lineup.

As indicated on pages 26-27 above, Detective Mahoney's testimony at the further Wade hearing dispelled the possibility, left open by his testimony at the first Wade hearing, that more than one other man had worn green upper garments at the lineup. Furthermore, even if Detective Mahoney's testimony were accepted in its entirety, it now appears that the lineup may have contained several of the suggestive influences deplored by the Supreme Court in United States v. Wade, 388 U.S. 218, 229-32 (1967). These dangers were particularly serious here because Mrs. Rippel's opportunity for observation had been minimal and her susceptibility to suggestion was therefore enormous.\* Mrs. Rippel was allegedly the victim of rape, a crime which "present[s]

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\* The lineup was not attended by any attorney representing Mr. Cannon. Any detection by Mr. Cannon of suggestive influences was impeded by use of a one-way mirror. See United States v. Wade, supra, 388 U.S. at 230-31 n. 13.

a particular hazard that a victim's understandable outrage may excite vengeful or spiteful motives." Id. at 230.

Detective Mahoney's testimony at the further Wade hearing indicates that suggestive influences in addition to the green upper garment may have been exerted to elicit an "identification" from Mrs. Rippel. He testified--for the first time--(a) that during the lineup he moved between the observation room and the lineup room (A. 25-26, 35), (b) that Detective Funk also "was in and out of both rooms" (A. 51) and (c) that Mrs. Rippel, who may have been with Lieutenant Reiss, was in the observation room for possibly 15 minutes (A. 35, 49, 51). The revelation of these movements from room to room may imply that the lineup had been even more suggestive than this Court thought possible solely on the record of prior proceedings. At the time Mr. Cannon had been picked up by Lieutenant Reiss and, a fortiori, at the time of the lineup, he was the prime suspect in the Rippel incident. Moreover, Detective Mahoney testified that he invariably sought positive identification based on the face of the suspect (A. 45-47). Thus, there is no way of ascertaining whether any subtle, possibly non-verbal suggestions may have been made during or as a result of the movements of detectives from room to room without the testimony of at least some of the other witnesses who Detective Mahoney said had attended the lineup (Mrs. Rippel, Detectives Funk and McDonald, and Lieutenant Reiss).

E. The Impermissibly Suggestive Lineup Gave Rise to a Very Substantial Likelihood of Irreparable Misidentification.

If the lineup was impermissibly suggestive, the facts of the instant case make it manifest that there was an unusually great likelihood of irreparable misidentification. See Simmons v. United States, 390 U.S. 377, 384 (1968); Stoval v. Denno, 388 U.S. 293, 302 (1967).

In determining whether an unduly suggestive lineup created a substantial likelihood of irreparable misidentification, "totality of circumstances" must be considered. 486 F.2d at 267.

On the previous appeal, this Court found that Mrs. Rippel's opportunity to "view the criminal at the time of the crime" was "limited" and that she had been grabbed from behind at night and attacked with her skirt held over her head. 486 F.2d at 267, 268. Specifically, this Court and the District Court found that she had never seen the face of her alleged assailant. Id.; 388 F. Supp. at 1203 n. 3, 1204. In addition, Judge Friendly found that Mrs. Rippel had caught "only a glimpse of [her alleged assailant's] clothing." 486 F.2d at 268. There was no indication that she had ever observed the "build and height" of her alleged assailant; her description was merely that "he wasn't heavy" (A. 97).

Even assuming that Mrs. Rippel had asked to see Mr. Cannon's profile and then "identified" him at the lineup as her assailant, her observation at that time provided no

foundation for the "identifications" introduced in evidence at trial. As Judge Friendly indicated, Mrs. Rippel's testimony that she had seen Mr. Cannon standing across the street from her and later walking through a gas station across from her was "substantially weakened on cross-examination." 486 F.2d at 268. Compare United States ex rel. Gonzalez v. Zelker, 477 F.2d 797, 802 (2d Cir.), cert. denied sub nom. Gonzalez v. Vincent, 414 U.S. 924 (1973); United States ex rel. Rutherford v. Deegan, 406 F.2d 217, 220 (2d Cir.), cert. denied, 395 U.S. 863 (1969). At the time she allegedly first observed the man across the street, there was a car next to her with five or six people in it, parked in front of a 24-hour grocery store. Moreover, her last observation was of the man's walking away from her (A. 91). At all the times that Mrs. Rippel allegedly had observed this man, she was neither a victim nor a witness to any crime. Thus, as this Court has observed on another occasion, she "would have less of a desire to seek out and retain such an image as would the victim." United States ex rel. Phipps v. Follette, 428 F.2d 912, 915 (2d Cir.), cert. denied, 400 U.S. 908 (1970). The darkness, the width of the street, Mrs. Rippel's recent consumption of alcohol and her agitated emotional state resulting from the fight with her husband combine to vitiate the accuracy of her testimony. So does Detective

Mahoney's testimony at the further Wade hearing that the type of green upper garment worn by Mr. Cannon at the lineup was popular at the time (A. 33). Compare Neil v. Biggers, 409 U.S. 188 (1972) (victim able to view assailant under adequate indoor lighting and, subsequently, under a full moon, was with him for 15-30 minutes, faced him directly at least twice, and testified there was something about his face she could never forget). Given all of these factors, the fact that the lineup was conducted five days after the alleged rape assumes importance because "the greater the interval, the greater the danger that the initial image will have dimmed and the second image will play a significant role." United States ex rel. Phipps v. Follette, supra, at 915. The introduction at trial of Mrs. Rippel's testimony that Mr. Cannon was her assailant and that she had identified him as such at the lineup permitted her to assert as fact that the man she said she had seen earlier was the man who had raped her--an inference which could properly be drawn only by the jury.

Mrs. Rippel's description of her assailant to the police would have encompassed hundreds of Negro males in the Rochester area at the time and was correctly found by the District Court to be "almost valueless". 388 F. Supp. at 1204. It was extraordinarily vague and far less detailed than the description found acceptable in Neil v. Biggers, supra, 409 U.S. at 200. Based upon that description, it is likely that

Lieutenant Reiss would have suspected any Negro male he encountered wearing a green upper garment.

As a result of the findings of this Court on the previous appeal, it is evident that an impermissibly suggestive lineup would create a very substantial likelihood of irreparable misidentification by Mrs. Rippel. The conclusion that due process was violated by permitting Mrs. Rippel to testify at trial that she had identified petitioner at the lineup as her assailant was not contradicted by any evidence adduced at the further Wade hearing.

Moreover, it is clear that Mrs. Rippel's in-court "identification" of petitioner as her assailant would be admissible only if the state proved by clear and convincing evidence that such testimony had an independent source. See, e.g., United States v. Wade, supra, 388 U.S. at 240; United States ex rel. Robinson v. Zelker, 468 F.2d 159, 164 (2d Cir. 1972), cert. denied, 411 U.S. 939 (1973); Clemons v. United States, 408 F.2d 1230 (D.C. Cir. 1968) (in banc), cert. denied, 394 U.S. 964 (1969); People v. Ballott, 20 N.Y.2d 600, 606, 233 N.E.2d 103, 286 N.Y.S.2d 1 (1967).

It is evident that the Superintendent is and will remain unable to comply with this standard. For the reasons discussed above, the belated assertion in this Court by the Superintendent that the independent source test is satisfied by Mrs. Rippel's testimony concerning a man who had "followed" her prior to the alleged attack clearly will not suffice. The danger expressed by the Supreme Court in United States v. Wade, supra,

388 U.S. at 229, that the issue of identification may be determined for all practical purposes at a lineup, was peculiarly manifest here.

The state-court record and the further Wade hearing irresistibly support the District Court's conclusions that the lineup was "impermissibly suggestive" and that "the possibility of irreparable misidentification was so great that it was error to admit any testimony with regard to identification at all." 388 F. Supp. at 1204.

F. The District Court Did Not Abuse Its Discretion By Inferring From the Failure of the Superintendent to Produce Either the Complaining Witness or Any of the Police Officers Allegedly Present at the Lineup That Their Testimony Would Not Have Helped the Superintendent's Case.

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The District Court held, solely on its evaluation of Detective Mahoney's "equivocal" testimony at the further Wade hearing, that "the inference of damaging suggestibility at the petitioner's lineup was not dispelled." 388 F. Supp. at 1203. The Superintendent's failure to produce at the further Wade hearing any witness to the lineup other than Detective Mahoney permitted the District Court, as trier of fact, to infer that such witnesses might not have been helpful to the Superintendent's case. In any event, the inference subsequently drawn by Chief Judge Curtin on the basis of the Superintendent's failure to call witnesses was not necessary to his decision; it was subsidiary to the factual findings based on Detective Mahoney's testimony.

The Superintendent's failure to call Mrs. Rippel or any of the other police officers was a further insufficiency because the remand to the District Court had been based on the inadequate development of "material facts" at the first Wade hearing.

1. The District Court had the power to infer witnesses not produced by the Superintendent would not have helped his case. When a potential witness who may have relevant information is available, and the relationship of that witness to one of the parties is such that the witness would have ordinarily been expected to testify favorably, failure of the party to produce the witness permits the trier of fact to infer that his or her testimony would have been unfavorable. C. McCormick, Evidence, § 272 at 656-57 (2d ed. 1973); 2 J. Wigmore, Evidence, §§ 285-88 (3d ed. 1940). This power is not cast as a presumption. It is an inference of fact and drawn at the discretion of the trier of fact. See, e.g., United States v. Cotter, 60 F.2d 689, 692 (2d Cir.), cert. denied, 287 U.S. 666 (1932); 2 J. Wigmore, supra, § 287.

The Superintendent misstates the test when he asserts that counsel for Mr. Cannon could have talked to the uncalled witnesses and, if necessary, might have called them as Mr. Cannon's own witnesses (and thereby vouch for their credibility). Availability is not determined merely by the physical presence of the witness in the courtroom or even upon accessibility by

subpoena, but instead upon the witness's disposition and relationship to the respective parties and the nature of the testimony that might be expected in light of previous statements or declarations about the facts of the case. United States v. Johnson, 467 F.2d 804, 808-09 (1st Cir. 1972), cert. denied, 410 U.S. 909 (1973); McClanahan v. United States, 230 F.2d 919, 926 (5th Cir.), cert. denied, 352 U.S. 824 (1956); United States v. Beekman, 155 F.2d 580, 584 (2d Cir. 1946); C. McCormick, supra, at 657-58. According to Wigmore:

"The inference is based, not on the bare fact that a particular person is not produced as a witness, but on his non-production when it would be natural for him to produce the witness if the facts known by him had been favorable." 2 J. Wigmore, supra, §286 at 166.

All of the above factors apply to the relationship of Mrs. Rippel and the three police officers other than Detective Mahoney to the Superintendent or the District Attorney. Indeed, the close working relation between a prosecutor and the law enforcement agency of which a police officer is a member has been found to create the affinity of interest necessary to permit drawing an inference when an officer is not produced. See State v. Davis, 73 Wash. 2d 271, 280-81, 438 P.2d 185, 190 (1968).\*

2. The Superintendent has no grounds to object to the exercise of the District Court's discretion in drawing inferences. On two occasions prior to the further Wade hearing, upon motion by Mr. Cannon, the District Court ordered the

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\* The facts in State v. Davis are very similar to those of the instant case, and the opinion of the court has been reproduced for the convenience of the Court in Addendum B to this Brief.

Superintendent and the District Attorney to disclose the identity and last-known locations of the participants in and witnesses to the lineup (App. 1-4, 5-7). However, counsel for Mr. Cannon received only an affidavit, dated June 28, 1974, from Melvin Bressler, Esq., Assistant District Attorney (App. 8-9). Not only did the affidavit state that the District Attorney had no addresses for any of the men in the lineup but also that Mr. Bressler had not talked to "Captain Reiss" or "Lieutenant Funk" and had "no idea if they were present at the lineup or not." No mention whatever was made of Mrs. Rippel or Detective McDonald. Counsel for Mr. Cannon attempted without success to locate the other participants in the lineup.

The Superintendent chose to produce only Detective Mahoney, who testified from memory about a lineup that had occurred almost six years before, notwithstanding the ample opportunity available to the Superintendent to locate and produce the other police officers who had been present at the lineup, as well as to locate and produce Mrs. Rippel. The determination of the credibility of Detective Mahoney's testimony at the further Wade hearing was specifically within the province of the District Court. Chief Judge Curtin found that Detective Mahoney's testimony was "equivocal". The witnesses who were not produced could have been examined not only about the color of the clothing worn by the other men in the lineup, but also as to matters revealed for the first time by Detective Mahoney at the further Wade hearing--e.g., the existence of additional suggestive influences arising from the several detectives' movements from room

to room. Also, since the scope of the further Wade hearing encompassed the ultimate issue of due process, their potential examination could have included the so-called independent basis for Mrs. Rippel's identification now asserted by the Superintendent. With all this, the Superintendent has no basis for objecting that Chief Judge Curtin inferred that the Superintendent's failure to produce other witnesses, who ordinarily would be expected to testify in his favor, indicated their testimony would not have been favorable to the Superintendent's case.\*

III. The Introduction at Trial of Mrs. Rippel's Purported Identifications at the Lineup and in Court Violated Substantial Constitutional Rights Belonging to Mr. Cannon.

The District Court correctly concluded that

"Finally, the admission of this identification testimony must be declared constitutionally harmful. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), because there was almost no other conclusive evidence introduced at the trial. This becomes more significant when corroboration requirements in effect at the time of the offense are considered." 388 F. Supp. at 1204.

It is probable, if not legally certain, that if either the alleged oral admissions of Mr. Cannon or Mrs. Rippel's identification testimony had been omitted from the trial, Mr. Cannon would not have been convicted. Detective Funk's testimony on cross-examination indicated a critical, if not fatal, contradiction as to the time when those alleged oral admissions had been obtained. If they had been obtained subsequent to the taking of the stenographic statement the jury could not consider them, and the case against Mr. Cannon would have failed because the

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\* Counsel for the Superintendent below was given notice that such an inference might be drawn but never objected. In fact, he stood on his decision to call only Detective Mahoney (A. 55).

prosecution would have lacked the corroboration required for a conviction of rape under the then-applicable New York law. N.Y. Penal Law § 130.15 (McKinney 1967). In fact, the last question asked by the jury before it reached its verdict was:

"If we disagree with the time of the oral statement and that statement, oral, was given to Mahoney, after the lineup, can we still consider it as evidence?" (Tr. 415)

The evidence in the case, absent Mrs. Rippel's dramatic "identifications" on direct examination, was hardly overwhelming. Compare Milton v. Wainwright, 407 U.S. 371 (1972); Schneble v. Florida, 405 U.S. 427 (1972); Harrington v. California, 395 U.S. 250 (1969). Indeed, this Court stated that if the lineup and in-court identifications were invalidated, "a problem of insufficient evidence . . . might conceivably arise." 486 F.2d at 268 n. 9. It is indubitable that the District Court was correct in concluding that the error was prejudicial; the Superintendent has neither attempted nor is he able to prove that the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

### CONCLUSION

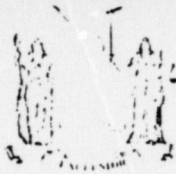
The further Wade hearing conducted pursuant to this Court's remand gave the Superintendent and the District Attorney of Monroe County many opportunities to supply any material fact that had not been adequately developed by the state court. The hearing itself was conducted by an experienced and fair federal trial judge who painstakingly evaluated the substance and credibility of Detective Mahoney's testimony and personally observed his demeanor and behavior on the stand. The findings and conclusions of the District Court in the instant case are supported by the monumental weight of all the evidence and by established legal principles. Accordingly, the judgment appealed from should be affirmed.

Respectfully submitted,

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June 12, 1975

ADDENDA



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August 26, 1974

Hon. John P. Curtin  
United States District Judge  
United States Court House  
Buffalo, New York 14202

Re: U.S. ex rel. ALTON CANNON v. Mancusi  
Civil 1970-535

Dear Judge Curtin:

This letter is submitted in lieu of a brief.

The Second Circuit says at 486 F.2d, page 268: "If all were dressed in green the inference of undue suggestion would clearly fail. If one or two had on green shirts, the inference would weaken very considerably." (underlining added). Stated otherwise, the inference of undue suggestion, although not clearly failing, remains weakened; nevertheless.

Detective Mahoney, testified at page 16 of the instant proceeding:

"Q. Now, with regard to the selection, did you find out of forty to fifty people present on the premises individuals with green clothing on, in the nature of sweaters or shirts of some sort?

"A. I found one, sir.

"Q. Only one?

ADDENDUM A

"A. Yes, sir."

At page 19:

"Q. The thing that stands out in your memory is that it was green?

"A. There are two reasons I recall the color. I believe I recall the color because the witness had observed that color on him on the night of the attack, and therefore I wanted to get a similar color on at least one or more individuals in the lineup.

"Q. So as you were picking people for the lineup, you were consciously looking for some one who had a green garment?

"A. That is right."

There were two green shirts in the lineup. The victim identified the petitioner. The inference of undue suggestion was weak. Coupled with trial testimony describing petitioner's oral admissions, the guilt of the petitioner is established.

The petition should be dismissed.

Very truly yours,

LOUIS J. LEFKOWITZ  
Attorney General  
Attorney for Respondent

By: *Bedros Odian*

To: William H. Gardner, Esq.  
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Bedros Odian  
Assistant Attorney General

The STATE of Washington, Respondent,

v.

Ronald E. DAVIS, whose true name is Duane  
H. Bellows, Leslie A. Huston and  
Francis E. Olson, Defendants,  
James L. Belknap, Appellant.  
No. 39376.

Supreme Court of Washington,  
Department 2.

March 6, 1968.

Rehearing Denied May 31, 1968.

### Headnotes Omitted

NEILL, Judge.

Defendant Belknap, along with three co-defendants, was convicted of attempted escape (RCW 9A.010). In 1966, the authorities of the Spokane County Jail, in which Belknap was incarcerated, were informed that an attempt to escape was being made. Investigation revealed a partially sawed hole in the metal floor of the common exercise area adjoining the prisoners' cells. Several pieces of hacksaw blade were found on one of Belknap's codefendants. The jail authorities questioned the inmates, including Belknap, some of whom gave oral and written statements.

A pretrial confession hearing, held pursuant to CrR 101.20W, established the following undisputed facts: (1) after discovery of the attempted escape, a sheriff's

captain had a conversation with Belknap; (2) an undersheriff was present at, but did not participate in, this conversation; (3) the captain informed Belknap of his constitutional rights as required by *Miranda v. State of Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); (4) Belknap understood his rights; and (5) Belknap was requested to give a written statement which he refused to do.

Other material factual details surrounding this conversation are in dispute. The sheriff's captain testified that: (1) after being informed of his rights, Belknap stated that he understood them, that he would waive his rights, would answer questions he felt it was wise to answer and would refuse to answer questions he felt it was unwise to answer, unless his attorney would be present; (2) defendant was told that the authorities knew he had not sawed on the floor but that he had sawed on a table brace; (3) Belknap replied that four men were involved in the attempt and that he had played his part by sawing on the table brace and acting as a lookout; (4) Belknap was requested to give a written statement; (5) he requested time to consider whether he would do so or whether he would consult his attorney first; (6) Belknap later informed the captain that he would not do so; (7) the captain did not know Belknap had an attorney; (8) Belknap did not request an attorney at any time prior to making the oral admissions; (9) Belknap was not told that charges might not be brought if he cooperated. Conversely, Belknap testified that: (1) after being warned of his rights, he told the captain that he would not say anything until he talked with his attorney; (2) he was informed that the captain had learned, from other inmates, of Belknap's part in the escape; (3) the state might not prosecute if Belknap cooperated; (4) the captain asked if it was true that defendant had sawed on a table brace and acted as a lookout; (5) Belknap replied that he would not answer until after consulting his attorney; (6) Belknap informed the captain of the name of his attorney; (7) Belknap in-

formed the captain that he had no statement to give, written or otherwise. The trial court believed the captain's version of the disputed facts and ruled that Belknap's alleged admissions were voluntary and admissible.

At trial Belknap renewed his objection to the captain's testimony as to the admissions, but it was admitted. Independently of the admissions, testimony of other inmates of the jail was that Belknap: (1) indicated to other inmates his participation in the escape attempt; (2) assisted in camouflaging the hole; (3) acted as a lookout; (4) helped other inmates muffle the noise of sawing the hole; (5) sometimes kept the hacksaw blades; and (6) sawed on a portion of a table used as a brace in the escape hole.

Belknap appeals. He first argues that because he denied the captain's version of the alleged admissions and because an undersheriff who was included in the list of the state's witnesses was neither called by the state nor his absence explained even though the undersheriff was present during the interrogation, the trial court erred in refusing to instruct the jury on the "missing witness" rule, i. e., the failure of the state to produce the undersheriff as a witness to verify Belknap's waiver of his constitutional rights raised an inference that his testimony would have been unfavorable to the state's case. This rule was defined in *Wright v. Safeway Stores, Inc.*, 7 Wash.2d 341, 346, 109 P.2d 542, 544, 135 A.L.R. 1367 (1941), quoting from 10 R.C.L. 884, § 32, as follows: (cf. 29 Am.Jur.2d Evidence § 178 (1967))

"\* \* \* it has become a well established rule that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation, he fails to do so,—the jury may draw an inference that it would be unfavorable to him \* \* \*

[1,2] In answer to this assignment of error, the state first argues that the failure

to call the undersheriff was explained to Belknap's counsel during a recess of the trial. However, although the state's explanation appears in its brief on appeal, there is nothing in the trial record to substantiate this explanation. This court has consistently held that cases on appeal must be decided on the record made in the trial court (*Lally v. Graves*, 188 Wash. 561, 63 P.2d 361 (1936)) and that we can only consider evidence presented in the record (*Falcone v. Perry*, 68 Wash.2d 909, 915, 416 P.2d 690 (1966); *Tyree v. Gosa*, 11 Wash.2d 572, 579, 119 P.2d 926 (1941); *Dibble v. Washington Food Co.*, 57 Wash. 176, 106 P. 760 (1910)). Therefore, for the purpose of considering this issue, we must assume that the state's failure to call the undersheriff was unexplained at the time of trial.

[3] The state next argues that the "missing witness" rule does not apply in the instant case because the undersheriff was equally available to either party; or stated another way, the rule only applies when the uncalled witness is "peculiarly available" to one of the parties. A witness, however, is not "equally available" merely because he was physically present at the time of trial or could have been subpoenaed by either party. As was said in *McClanahan v. United States*, 230 F.2d 919, 926 (5th Cir.1956):

\* \* \* "the availability of a witness is not to be determined from his mere physical presence at the trial or his accessibility for the service of a subpoena upon him. On the contrary, his availability may well depend, among other things, upon his relationship to one or the other of the parties, and the nature of the testimony that he might be expected to give \* \* \*." *Deaver v. St. Louis Public Service Co.*, Mo.App., 199 S.W.2d 83, 85.

[4] For a witness to be "available" to one party to an action, there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for

knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging. The rationale behind this definition of the "availability" of a witness is aptly summarized in 5 A.L.R.2d 895 (1949), as follows:

If such an inference is to be drawn it becomes necessary to determine which of the parties to the action should have called the witness in order to determine who should bear the onus of the adverse inference or presumption. \* \* \* one of the factors which determines this question is the relationship which the potential witness bears to the parties, the logical inference being that a person will be likely to call as a witness one bound \* \* \* [to] him by ties of interest or affection unless he has reason to believe that the testimony given would be unfavorable, and that a party closely connected with the witness will be *more likely to be able to determine in advance what his testimony will be if he is called.* On the other hand, a party should not be required to call a witness likely to favor his opponent's case, *since by so doing he must ordinarily vouch for his credibility and lose his opportunity to impeach or cross-examine the witness.* (Italics ours.)

We are of the opinion that, under the facts of the case at bar, the uncalled witness was not equally available to either party as argued by the state, but rather was "peculiarly available" to the prosecution as these words are defined above. The uncalled witness was a member of the same law enforcement agency as the testifying officer. He was the only other witness to the interrogation. The law enforcement agency of which he was a member was responsible for investigating and gathering all the evidence relative to the charges made against Belknap. The uncalled witness worked so closely and continually with the county prosecutor's office with

respect to this and other criminal cases as to indicate a community of interest between the prosecutor and the uncalled witness.

The state's next argument is that the missing witness rule does not apply in the instant case because the testimony of the uncalled witness, the undersheriff, would merely have been "cumulative." The state relies on *Wright*, supra, in which we said at 347 of 7 Wash.2d, at 544 of 109 P.2d, quoting from 10 R.C.L. 886 § 33: (cf. 29 Am.Jur.2d Evidence § 186 (1967))

"The presumption arising from a failure to call a witness applies only to witnesses \* \* \* whose testimony would not be trivial, or to be classed as merely cumulative, but important and necessary."

Similarly, Professor Wigmore has stated in 2 Wigmore, Evidence § 287 (3d ed. 1940):

[I]t seems plain that possible witnesses whose testimony is for any reason comparatively *unimportant*, or *cumulative*, or *inferior* to what is already utilized, might well be dispensed with by a party on general grounds of expense and inconvenience, without any apprehension as to the tenor of their testimony. \* \* \*

But, like all general rules, this limitation on the missing witness rule has its exceptions. Wigmore qualifies this limitation by saying that it depends on the facts of each case for its application and that it "should not be enforced with any strictness; otherwise it would become practically objectionable \* \* \*." Wigmore, supra, § 287. Wigmore, further indicated that, although "it is commonly said \* \* \* that the prosecution's failure to call an eye-witness is not open to inference" since no rule requires "that all *eye-witnesses* shall be called;" nevertheless "*there can be no such general principle, for sometimes the inference would be well founded.*" (Italics ours.) Wigmore, supra, § 290(1). Had the potential testimony of the undersheriff related to some minor factual issue or even to one of the elements of the crime with which Belknap is charged, we could well accept the state's argument on this

point. However, the disputed issue of fact to which the undersheriff's testimony would have related—the validity of Belknap's alleged waiver of his constitutional rights—is one of fundamental importance and hence any testimony relative thereto is clearly not unnecessary, "trivial" or "comparatively unimportant." The United States Supreme Court in *Miranda*, supra, warned that where the prosecution has the only means of making available corroborated evidence of such waivers, there is a heavy burden of proof on the prosecution. In the case at bar, the only evidence actually presented by the prosecution was completely contradicted by the defendant; and yet, even though the undersheriff was the only other available source of evidence relative to this dispute, the prosecutor failed to call him as a witness or to explain his absence. We are therefore of the opinion that the inference arising under the missing witness rule, as a result of the prosecution's failure to call the undersheriff, is well founded in the instant case.

[5] Finally, the state argues that Belknap failed to make any showing or contention that the testimony of any witness, who could testify as to any material facts, was being willfully withheld, relying on *State v. Baker*, 56 Wash.2d 846, 859, 355 P.2d 806, 814 (1960), in which we held that

The inference that witnesses available to a party and not called would have testified adversely to such party arises only where, under all the circumstances of the case, such unexplained failure to call the witnesses creates a suspicion that there has been a willful attempt to withhold competent testimony. *Wright v. Safeway Stores, Inc.*, 7 Wash.2d 341, 109 P.2d 542 (1941), 135 A.L.R. 1367.

\* \* \*

See, also, *State v. Nelson*, 63 Wash.2d 188, 386 P.2d 142 (1963). The holdings in these cases, however, do not mean, as the state seems to imply, that in order to obtain the

benefit of the missing witness rule in a criminal case one must prove facts sufficient to establish a deliberate suppression of evidence by the prosecution with knowledge that such evidence, if produced, would support the defendant's case. Such conduct by the prosecution has, of course, been condemned in both federal and state courts as a denial of due process and thus a ground for the reversal of any conviction resulting therefrom. *Brady v. State of Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *United States ex rel. Meers v. Wilkins*, 326 F.2d 135 (2d Cir. 1964); *People v. Fisher*, 23 Misc.2d 391, 192 N.Y.S.2d 741 (1958). Rather, the quoted language above simply means that one must establish such circumstances which would indicate, as a matter of reasonable probability, that the prosecution would not knowingly fail to call the witness in question unless the witness's testimony would be damaging. In other words, "the inference is based, not on the bare fact that a particular person is not produced as a witness, but on his non-production *when it would be natural for him to produce the witness if the facts known by him had been favorable.*" (Italics ours.) *Wigmore*, supra, § 286. Proof of such circumstances, unlike proof of a deliberate suppression of material evidence, does not establish a denial of due process, but only gives rise to an inference unfavorable to the prosecution which may be drawn by the jury in its discretion. Considering the heavy burden *Miranda*<sup>1</sup> places on the prosecution to prove the validity of an alleged waiver, the close working affiliation between the prosecutor and the law enforcement agency of which the undersheriff is a member, the sharp conflict between the testimony of Belknap and the only officer actually testifying, and the fact that the undersheriff was the only other person present during the interrogation and therefore the only other source of relevant evidence—we con-

1. *Miranda* burdens apply to all trials commenced after June 13, 1968. *Johnson v. State of New Jersey*, 384 U.S. 719, 86

S.Ct. 1772, 10 L.Ed.2d 882 (1966). Trial of this cause commenced November 28, 1966.

clude that, in view of the state's burden under *Miranda*, Belknap established those circumstances necessary to give rise to the inference of the missing witness rule and that the trial court erred in failing to so instruct the jury.

In *Wright*, supra, 7 Wash.2d at 347, 109 P.2d 542, we said that when the missing witness rule is applicable the jury should be instructed that they may draw an unfavorable inference against the party failing to call the missing witness, if they believe such inference is warranted under all the circumstances, and should not be instructed that there is a presumption against that party. Nevertheless, we further stated that: "The use of the term 'presumption' will not, however, be fatal to the instruction if the context shows that it was used in the sense of an inference which the jury were at liberty to draw." While we do not commend the language "it may be presumed" as used in Belknap's proposed instruction, we are of the opinion that such language in the context of the entire instruction may be construed as being "used in the sense of an inference." Upon retrial, if the state fails to either call the undersheriff or explain his absence, thereby invoking the missing witness rule, Belknap's proposed instruction would be better phrased if it more closely followed the indications in *Wright*, as stated above.

[6] Belknap's second assignment of error is that the court erred in allowing into evidence the captain's testimony concerning the alleged admission made by Belknap during the interrogation. Belknap's argument with respect to the admissibility of his alleged admissions in effect involves two distinct questions: (1) did, in fact, Belknap make the alleged admissions; and (2) if so, did he knowingly, voluntarily and intelligently waive his constitutional rights prior to making such admissions, or more precisely, did the prosecution meet its burden of proving such a waiver. We are of the opinion that the first question is simply a disputed question of fact which raises no constitutional issues and to which

the *Miranda* holding with respect to the state's burden of proof is not applicable. With respect to the second question, Belknap makes two assertions of facts occurring during the pretrial confession hearing which, if true, could render the alleged admission inadmissible under the *Miranda* holding: (1) The sheriff's captain allegedly continued the interrogation after Belknap invoked his right to remain silent and his right to counsel. The Supreme Court in *Miranda* was unequivocal in holding that

The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned. (384 U.S. p. 444, 86 S.Ct. p. 1612.)

(2) The sheriff's captain allegedly indicated to Belknap that charges might not be brought if he cooperated and made a statement. *Miranda* specifically held that "any evidence that the accused was \* \* \* cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." (P. 476, 86 S.Ct. p. 1629) "Cajolery" may be defined as a deliberate attempt at persuading or deceiving the accused, with false promises, inducements or information, into relinquishing his rights and responding to questions posed by law enforcement officers. As already indicated, both of the aforementioned questions involved in Belknap's argument are sharply disputed and the only available evidence is the conflicting testimony of the accused and one police officer.

In cases prior to *Miranda* involving a factual dispute, the resolution of which determined the admissibility of a confession or admission, we consistently applied the following rules: (1) where the trial court clearly weighed the conflicting evidence before it, this court on appeal will not disturb the trial court's determinations, if supported by substantial evidence, as to the admissibility of the statement. *State v. Nesrallah*, 66 Wash.2d 248, 401 P.2d 968 (1965); *State v. Burgess*, 71 Wash. Dec.2d 604, 430 P.2d 185 (1967); (2) "substantial evidence" is defined as that character of evidence which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. *Bland v. Mentor*, 63 Wash.2d 150, 385 P.2d 727 (1963); (3) where the trial court has found that the testimony of police officers is entitled to greater credibility than that of the accused and therefore has chosen to believe the officers' version, the function of this court is not to re-evaluate the relative credibility of the witnesses' testimony. *State v. Reed*, 56 Wash.2d 668, 354 P.2d 935 (1960); and (4) while significant weight is attached to the findings of fact relative to the voluntariness of a confession, nevertheless this court has a duty and obligation, where basic constitutional rights are involved, to carefully review the record brought before us and determine therefrom whether the bounds of due process requirements have been exceeded. *State v. Hoffman*, 64 Wash.2d 445, 392 P.2d 237 (1964).

But for the holding in *Miranda*, we would have no hesitancy in sustaining the trial court's findings with respect to both questions involved in Belknap's second assignment of error according to the rules summarized above as applied in our prior cases. The problem posed in the instant case, however, is what effect, if any, the burden of proof requirement established by *Miranda* has on these rules as they apply to each of the two questions raised by Belknap's argument.

[7] The thrust of *Miranda* is aimed at the state's burden of proving that the appropriate warnings were given and that the accused effected a valid waiver, and does not apply to the state's burden of proving that the confession was in fact made. Thus, we do not believe *Miranda* in any way affects the rules summarized above as they apply to the first question and hence we cannot overturn the trial court's findings that Belknap did make the alleged admissions.

The second question raised by Belknap's argument, involves whether or not the prosecution met its burden of proving the validity of Belknap's alleged waiver of his rights. This question is clearly within the scope of the constitutional requirements as defined in *Miranda*. The issue here is not whether *Miranda* renders unconstitutional those rules which we have traditionally followed in reviewing a trial court's findings with respect to the admissibility of an alleged confession or admission; clearly it does not. We recognize that in cases prior to *Miranda* we were primarily concerned with the voluntariness of a confession, whereas after *Miranda*, we must, in addition, consider whether the accused was informed of his constitutional rights and whether he thereafter knowingly and intelligently waived those rights prior to making the statement. Nevertheless, the rationale behind these rules prior to *Miranda* is equally applicable to post-*Miranda* cases. Neither is the function of this court to retry factual issues or to re-evaluate the credibility of witnesses, nor are we well equipped to do so; and this is particularly true where, as here, the only evidence relative to the factual dispute is the contradictory testimony of two witnesses. As we said in *In re Martinson's Estate*, 29 Wash.2d 912, 920, 190 P.2d 96, 100 (1948):

A trial judge is much more than a commissioner named to take and collect evidence in a case. He is a judicial officer provided for by our constitution, and the laws of this state. He has had years of experience as a trial lawyer, and as

a judge. \* \* \* The credibility of the witnesses, and the force of their testimony, and the weight that should be attached to it, are all matters concerning which the trial judge is the best judge.

Succinctly stated, the real issue in the instant case is whether, in light of *Miranda's* placing a heavy burden of proof on the prosecution, we must now require a greater quantum and quality of proof than we did in pre-*Miranda* cases when we apply the "substantial evidence" test upon review of a trial court's findings as to the validity of an accused's waiver.

The Supreme Court in *Miranda* was unequivocal in holding that "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." (Italics ours.) (384 U.S. p. 475, 86 S.Ct. p. 1628) The court was equally clear in expressing its reasons for placing the burden of proof on the prosecution. "Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders." (Italics ours.) (P. 475, 86 S.Ct. p. 1628)

[8] As to the quantum and quality of proof required to prove a valid waiver, *Miranda* holds that "This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and we re-assert these standards as applied to in-custody interrogation." (P. 475, 86 S.Ct. p. 1628) In *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), it was stated that " \* \* \* 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of funda-

mental rights.'" Moreover, even prior to *Miranda* it was well established that for the prosecution to meet its burden of proving a valid waiver: (1) "convincing evidence" must be presented, *Judd v. United States*, 39 U.S.App.D.C. 64, 190 F.2d 649 (1951); *Nelson v. United States*, 93 U.S.App.D.C. 14, 208 F.2d 505 (1953); (2) "clear and positive testimony" must be produced, *Judd* and *Nelson*, supra; and (3) the government's burden of proof is greater where the alleged waiver was given while the accused was under arrest, *Judd*, supra. Some courts have gone even further and required that the trial court must find admissibility beyond a reasonable doubt before the confession may be submitted to the jury. *People v. Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838, 204 N.E.2d 179 (1965). But see contra, *People v. Scott*, 29 Ill.2d 97, 193 N.E.2d 814 (1963); *Clifton v. United States*, 125 U.S.App.D.C. 257, 371 F.2d 354 (1966), cert. denied 386 U.S. 995,\* 87 S.Ct. 1312, 18 L.Ed.2d 341. The latter view seems to be predominate and correct.

Furthermore, in accordance with its recognition of the high standards of proof required to prove a valid waiver of constitutional rights, *Miranda* is emphatic that no presumptions are available to aid the prosecution in its attempt to prove a valid waiver of the rights to counsel and to remain silent. The court specifically indicates that a waiver will not be presumed: (1) simply from the silence of the accused after the warnings are given (384 U.S. p. 475, 86 S.Ct. 1602); (2) simply from the fact that a confession was in fact eventually obtained (p. 475, 86 S.Ct. 1602); (3) if the individual answers some questions or gives some information on his own initiative prior to invoking his right to remain silent when interrogated (p. 475, 86 S.Ct. 1602); (4) if the accused fails to ask for the assistance of an attorney (p. 470, 86 S.Ct. 1602); and (5) from a silent record (p. 475, 86 S.Ct. 1602).

2. *Clifton* is dismissed in 43 Notre Dame Lawyer 11" (October 1967) in a casenote reviewing this issue.

Moreover, *Miranda* specifically points out certain factual criteria which should be considered in determining the validity of a waiver, including the existence of tricks, cajolery, lengthy interrogation, or incommunicado incarceration prior to the waiver, as well as the time interval between the alleged waiver and the giving of a statement.<sup>3</sup> But these factual criteria are of little value in determining whether the police in a particular case have followed the mandate of *Miranda*, if the only proof relative to such criteria is the testimony of one interrogating officer—the very person who allegedly violated the accused's constitutional rights. If in fact an accused's waiver is not valid, often his only means of proving the invalidity is his own testimony to that effect. But a review of cases, in which the issue of the admissibility of a confession had to be resolved on the basis of a "swearing contest," indicates that almost invariably the police officer was held by the trial court to be more credible than the accused. In contrast to the accused's inadequate means of establishing evidence, the police, when interrogating the accused within the confines of a station house, have readily available numerous methods and techniques of establishing corroborating testimony and independent supporting evidence, e. g., (1) the officers, in addition to the interrogating officer, who may witness the accused's waiver; (2) stenographers; (3) tape recordings; (4) motion pictures; and (5) video tape recordings.

[9] With respect to certain of the factual criteria mentioned in the preceding paragraph, the court in *Miranda* stated at 476, 86 S.Ct. at 1629:

*Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a*

*statement is made is strong evidence that the accused did not validly waive his rights. \* \* \* Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. (Italics ours.)*

The language quoted above, particularly as emphasized, has been interpreted by some authorities to mean:

[T]hat confessions achieved by custodial interrogation are regarded with so much distrust by the *Miranda* justices that something resembling a presumption against their admissibility is taking shape. Though calling this a presumption of police misconduct and perjury might not be accurate, and would doubtless be resented, it should be recognized that the evidentiary problem of proving a valid waiver of *Miranda* rights is not much different from what it would be if such a presumption existed. 19 Am. Jur. Proof of Facts 72.

See also Justice White's dissenting opinion, *Miranda*, supra, at 526, 86 S.Ct. 1602; B. James George, Jr., *Constitutional Limitations on Evidence in Criminal Cases*, Institute of Continuing Legal Education, Ann Arbor, Michigan, 1966, p. 120. While we do not particularly subscribe to this interpretation, we do believe that the Supreme Court intended a mandate to require the adoption of more credible and sophisticated techniques of proof than was formerly the case. So long as interrogation takes place in isolated circumstances, with no one present who is either favorable to the accused or suited for the role of a neutral and impartial observer, some firmer guaranty that constitutional rights have been observed will normally be necessary than can be provided by a mere "swearing contest" between the accused and one interrogating police officer.<sup>4</sup>

3. For numerous other criteria which may be considered, see 17 Am.Jur. Proof of Facts 91.

4. Because the pressures on the accused are substantially greater and the means

of establishing corroborating evidence are more extensive within the relatively controlled environment of the station house, whereas the situation outside in the "field" is often confused and of an

[10] Considering the facts as presented in the case at bar, we cannot hold that the prosecution has met the burden of proving the validity of Belknap's alleged waiver as required by the holding in *Miranda*: (1) the admission was made while the defendant was in police custody within the confines of the police station; (2) presumably the police had both the opportunity and the means readily available to establish substantial corroborating evidence; (3) the only evidence presented by the prosecution consisted of the testimony of one interrogating officer; (4) the officer's testimony was neither corroborated by other testimony nor supported by other independent evidence; (5) the officer's testimony was completely contradicted by the defendant; and (6) a second officer, who was the only other person present during the interrogation, was not called as a corroborating witness by the prosecution nor was his absence explained, and in the instant case this last element may be deemed determinative.

Belknap next makes several assignments of error all relating to the adequacy of the trial court's instructions relative to the specific intent necessary for the crime of attempted escape. Since we believe these assignments are without merit we will but briefly discuss them. The core of Belknap's argument on this point is that the jury should have been specifically instructed that intent could not be inferred from an overt act alone.

[11] The jury was instructed that they had to find circumstances "such as would authorize them to infer the intent with which the acts were done." Such circumstances included the evidence, as described earlier, of defendant's activities in connection with the escape attempt. Reading together the cases of *State v. Leach*, 36 Wash.2d 641, 219 P.2d 972 (1950), and

*State v. Lewis*, 69 Wash.2d 120, 417 P.2d 618 (1966), relied upon by Belknap and the state, respectively, we can derive the following rule: where a defendant's acts are patently equivocal, criminal intent may not be inferred from the overt acts alone; however, specific criminal intent may be inferred from the conduct where it is plainly indicated as a matter of logical probability. Considering all the facts and circumstances surrounding the attempted escape, we are of the opinion that Belknap's conduct was not patently equivocal; rather his conduct was such that intent could be inferred therefrom as a matter of logical probability. Furthermore, Belknap's acts were not merely preparation as he contends; the preparation stage had long since passed and the attempt had commenced. Thus, the trial court did not err in refusing to give the instruction requested by Belknap or in giving the instruction which referred to the intent to aid and abet and to the overt acts from which this requisite intent could be found.

Belknap further argues that, because as a prisoner he had no choice but to be immediately present at the scene of the crime, the trial court was in error in instructing the jury that proximity to the scene with others makes the acts of one the acts of each of the others. However, as pointed out by the state, the instruction referred only to persons engaged "in a common criminal escapade" and required the jury to distinguish those prisoners who merely approved of or acquiesced in the attempt from those who aided and abetted and thereby became principals.

As his final assignment of error, Belknap contends that the trial court abused its discretion in denying his motion for a separate trial. Belknap argues that the following circumstances created a danger that the jury would find him guilty by association or by the process of elimination: All

\* emergency nature, the prosecution's burden of proving the validity of waivers allegedly made in the "field" may be lighter than in the case of "station house" waivers. Kambar, Yale: "A Dissent from

the *Miranda* Dissents: Some Comments on the 'New' Fifth Amendment and the Old 'Voluntariness' Test." *Michigan Law Review*, Nov. 1966, vol. 65, pp. 59, 61. 19 Am.Jur. Proof of Facts 69.

the defendants were incarcerated in the same confined cell area; someone had unquestionably cut a hole in the jail floor; the interests of the defendants were directly opposed as they all plead not guilty thereby tending to incriminate their codefendants.

[12-14] The granting of separate trials under RCW 10.46.100 is discretionary with the trial court and this court will not overturn a trial court's determination except in the case of manifest abuse of discretion. *State v. Courville*, 63 Wash.2d 498, 387 P.2d 938 (1963). The fact that the interests of all the participants in a crime conflict does not require that the court grant each of several participants a separate trial. Such conflicts invariably will be present "where two or more persons are tried for the same crime \* \* \*" and if such conflicts are "regarded as requiring a separate trial, it is at once plain that the statute is rendered nugatory, and joint trials will be the exception and not the rule. But such was not the intent of the legislature." *State v. Clark*, 156 Wash. 47, 51, 286 P. 69, 71, 85 A.L.R. 502 (1930). The trial court did not abuse its discretion in refusing to grant Belknap a separate trial.

Reversed and remanded for new trial.

FINLEY, C. J., HUNTER and HAMILTON, JJ., and OTT, J. Pro Tem., concur.

FINLEY, Chief Justice (concurring specially).

I have signed and concur in the majority opinion. In my judgment it is a realistic and accurate evaluation and application of the law, particularly as construed presently by the United States Supreme Court in *Miranda v. State of Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). My purpose in concurring specially is not to detract from the majority decision in any way, but to place in proper perspective the basis of my concurrence. My specific concern is with the majority's disposition of defendant-Belknap's second assignment of error, viz., the propriety of allowing in to evidence testimony of the sheriff's cap-

tain concerning alleged admissions made by Belknap during interrogation. I wish to discuss whether Belknap ought to be found to have waived his constitutional rights prior to making the alleged admissions, and whether in any event the matter of his waiver ought to provide a basis for a new trial under the facts in the instant case.

As indicated by the majority, the evidentiary dispute over whether Belknap did or did not waive his constitutional rights may be simply and aptly characterized as a "swearing contest" in which Belknap says he did not waive his rights and the captain says he did. There is no corroborating evidence for either side except whatever implications or presumptions may be drawn from the silence of a second officer who was present during Belknap's interrogation but was not put on the stand as a witness by the state. *Under these circumstances*, I am convinced the United States Supreme Court has made it quite clear that it cannot be said Belknap waived his constitutional rights. *Miranda v. State of Arizona*, supra. Although quoted in part by the majority, the following passage from *Miranda* is set forth here to demonstrate the inexorability of the foregoing conclusion:

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. \* \* \* This Court has always set high standards of proof for the waiver of constitutional rights \* \* \* and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

An express statement that the individual is willing to make a statement and does not want an attorney followed *closely* by a statement *could* constitute a waiver. But a valid waiver will *not* be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. \* \* \* Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated.

*Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation. 384 U.S. at 475-476, 86 S.Ct. at 1628-1629. (Italics mine.)*

The thrust of the foregoing commentary is plain and unambiguous. There is a heavy burden upon the state to prove waiver if statements obtained during incommunicado interrogation, such as in the instant case, are to be admissible as evidence. The prosecution did not meet this burden with respect to defendant-Belknap's alleged in-custody admissions and a new trial must therefore be granted.

The decision of the Court in *Miranda v. State of Arizona*, supra, is the law of the land. It is, or should be, a truism of absolute quality that state court judges, and others, are duty-bound to uphold and apply the law as construed by the Court. Even so, in my judgment some comment is appropriate relative to what I believe are some disturbing jurisprudential and societal ramifications and consequences of *Miranda*. For although I must and do support the decision judicially, I disagree with it, at least philosophically or in an essentially academic sense.

As state law is affected more and more by a seemingly ever-expanding interpretation and application of the federal constitution, some may tend to forget the legal niceties upon which intervention of the United States Supreme Court is predicated in matters of state criminal law administration. The usual theoretical legal basis, as in *Miranda*, for applying the principles of some of the federal constitutional amendments to the states is the "due process" clause of the Fourteenth Amendment. The *Miranda* rules are made applicable to the states because of a composite, majority judgment of the members of the Supreme Court that such rules must be applied to accord "due process of law" for individuals accused of crimes.

However, there is nothing thaumaturgic about the term "due process of law." Its substance does not spring from timeless oracles. Rather, the words "due process of law" are (to paraphrase a general philosophical observation of Mr. Justice Holmes) merely the "skin of ideas." In very large measure due process of law, in my considered opinion, represents personal value-judgments made by different jurists at different times under different circumstances. According to reasonable and rational validity to the foregoing postulates, there should be no inference of contumacy or heresy in critically analyzing and evaluating any and all judicial declarations which ostensibly or purportedly provide additional substance to the shifting and varying content of those fundamental social values

characterized by the Court as "due process of law."

When one speaks of the rights of society, he is in a sense speaking of the composite or collective rights of individuals. But this does not mean that the composite rights of individuals as a social body can be protected, as the *Miranda* decision would appear to suggest, by protecting the rights of individuals as discrete entities or beings. Equating the sum of the parts with the whole—and vice versa—may work well in the field of mathematical logic, but this is not necessarily so in the area of human relationships. The interests, needs, wants, and values of the group often differ from and conflict with those of its component parts, and cognizance should be taken by the judiciary of these differences and conflicts when developing and enunciating due process rights.

Whenever an individual is accused of committing a crime, two diametric forces are set in motion. On the one hand there are the rights which society affords individuals as individuals to protect them from overbearing and oppressive actions by government. On the other hand there are the rights which society reserves for itself, that is, for individuals as a whole, in the interest of protection and security from attack by individual transgressor members of society. In a sense, each is the obverse of the other. Obviously, neither set of rights can be given absolute, unqualified application without denegating the other. Thus, it is a prime function of the law and the courts to effect a rational accommodation of these two competing social forces so that both are accorded reasonable effectiveness.

Viewed realistically, courts have traditionally reconciled or balanced competing social forces in making value-judgments as to which should, under particular circumstances, be given the greater effect. Per-

haps the judicial function, in Benthamite-Mill terminology, seeks to ascertain and promote "the greatest happiness of the greatest number." But, in the criminal law field it seems to me that courts are now required to overlook or ignore this legal balancing mechanism and instead concentrate on maximizing the individual rights of criminal defendants.

In the instant case defendant-Belknap was convicted of attempting to escape from the Spokane County jail. He was in the jail as a transferee from the Washington State Penitentiary. He had been confined in the penitentiary because of a grand larceny conviction. It would seem apparent that society is vitally interested in seeing that criminal offenders in custody, such as defendant, do not escape confinement. Not only is society interested in being protected from further depredations of such offenders, but society is also interested in the rehabilitation of criminal offenders. Yet it is precisely these vital social interests which the Supreme Court's decision in *Miranda* now seems to frustrate. We are obliged to grant a new trial to a convicted felon whom no reasonable man can doubt attempted to escape jail. This action is required, not because statements which he allegedly made were unreliable or untrue, not because there is even a slight suggestion he was improperly treated, but because the state has not met what in my opinion is an inordinately heavy burden of showing that what are termed the "*Miranda* warnings" were given and that defendant-Belknap waived his rights pursuant to these warnings.

Due process considerations encompass not only fundamental individual rights but fundamental societal rights as well. It is as judicially inappropriate to ignore the one as it is to ignore the other. In my judgment, the Supreme Court in *Miranda* gave little significant attention to the societal aspects of due process.<sup>1</sup> It seems to me quite likely

1. It is ironic to me that the Supreme Court, which has so studiously ignored this concept of due process in criminal cases, has carefully applied it elsewhere. For example, in *Zemel v. Rusk*, 381 U.S.

1, 14, 85 S.Ct. 1271, 1279, 14 L.Ed.2d 179 (1965), a case concerning restrictions on travel to Cuba, Mr. Chief Justice Warren, author of *Miranda*, stated that the right to travel is not absolute under the

that *Miranda* will substantially increase the difficulty of obtaining convictions. This was emphasized in the dissent of Mr. Justice White. 384 U.S. at 541, 86 S.Ct. 1602. Perhaps any such worsening of the interests of organized society would not be objectionable if it were necessary to prevent individuals accused of crimes from being subjected to oppressive, inquisitorial interrogation. The fact of the matter is, however, that there is little if any statistical data or other comprehensive, reliable information which suggests that such improper interrogations take place on a wide-ranging scale in all police departments throughout the land. Obviously, some policemen in some police departments in some cities under some circumstances violate generally-recognized standards of fair play. But, when and where violations take place, there are better ways of dealing with them than reversing criminal convictions. Exercise of contempt of court powers, establishment of high level state commissions on criminal law administration, and provisions for effective civil redress would serve far better as modes of "policing the police" than defeating governmental or society's efforts to protect itself from individual transgressors.<sup>3</sup>

There is a second aspect of *Miranda* which also troubles me deeply. My reading of the case indicates that failure to meet its strict requirements is per se harmful error and thus grounds for reversal.<sup>3</sup> In other words, the defendant has a right to a new trial, regardless of the impact of such error on his first trial. In my judgment, this is an illogical and inappropriate juristic assumption. Appellate courts constantly perform the function of evaluating harmful effects which improper evidence may have

had on civil trial and there is no reason why they should not be competent and trusted to perform this function as to criminal trials. See *State v. Wells*, 72 Wash. Dec.2d 484, 492 n. 4, 433 P.2d 869, 873 n. 1 (1967) (concurring opinion). This was the approach apparently endorsed and employed by the Supreme Court when it decided *Crooker v. State of California*, 357 U.S. 433, 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958) ("sum of the circumstances" test) and *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942) ("totality of the evidence" test), and I find it regrettable indeed that the Court has now chosen to disregard the wisdom of the judicial approach of these cases.

That results under a "harmful per se" rule are illegal and undesirable is graphically illustrated in the instant case. The physical evidence and testimony of other cellmates introduced at defendant-Belknap's trial would be enough upon retrial to convince any jury of reasonable minds *beyond a reasonable doubt* that the defendant attempted to escape jail. The prejudicial effect on the trial of the interrogating officer's statements concerning alleged admissions of Belknap was insignificant. Surely it would be more rational to hold judicially that, under the test suggested in *Chapman v. State of California*, 386 U.S. 18, 21-24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), no new trial is necessary because the error which resulted from admission of the officer's statements into evidence was harmless *beyond a reasonable doubt*. See A. Holtzoff, *Shortcomings in the Administration of Criminal Law*, 17 *Hastings L.J.* 17 (1965).

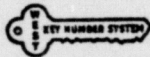
I suppose it is rather superfluous to add that, were I free to choose, I would not

<sup>3</sup> Fifth Amendment because "[t]he requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction."

<sup>2</sup> See reference to alternative methods of regulating police activities in R. Finley, "Who is on Trial—The Police? The Courts? Or the Criminally Accused?" 57 *J.Crim.L.C. & P.S.* 379 (1966).

<sup>3</sup> The Court stated in *Miranda*, 384 U.S. at 479, 86 S.Ct. at 1630: "[U]nless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." (Italics mine.)

follow the majority's decision in the instant case but, on the basis of a rule of harmless error, would instead affirm defendant-Belknap's conviction. But, I am not free to choose, for the Supreme Court has exercised *its* discretion. A choice has been made by the Court striking a balance between liberty and order and between the one and the many. Any discretion or choice which I may have had has been preempted. Thus, the majority opinion in the instant case aptly states the law, and I must fully, albeit unhappily, concur.



APPENDIX FOR APPELLEE

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA ex rel.  
ALTON CANNON

-vs-

Civ-1970-535

HAROLD J. SMITH, Superintendent,  
Attica, Correctional Facility,  
Attica, New York

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SIR: Take notice of an ORDER, of which the within is a copy,  
duly granted in the within entitled action on the 12th day of  
April, 1974, and entered in the Office of the  
Clerk of the United States District Court, Western District of  
New York, on the 12th day of April, 1974.

Dated: Buffalo, New York

April 12, 1974

JOHN K. ADAMS, Clerk  
U.S. District Court  
U.S. Courthouse  
Buffalo, New York 14202

William H. Gardner, Esq. and  
Frederick A. Provorny, Esq.  
TO: Attorney for Plaintiff

Louis J. Lefkowitz, Esq. and  
Monroe County District Attorney  
TO: Attorney for Defendant

App. 1

FEDERAL RULES OF CIVIL PROCEDURE 77 (d)

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

CIVIL 1970-535

UNITED STATES OF AMERICA ex rel.  
ALTON CANNON,

Petitioner

-vs-

HAROLD J. SMITH, Superintendent,  
Attica Correctional Facility,  
Attica, New York,

ORDER

Respondent

Petitioner, by his attorney, William H. Gardner, having moved by Affidavit of William H. Gardner, sworn to March 22, 1974 for the relief therein mentioned, and it appearing by the Affidavit of William H. Gardner, sworn to March 25, 1974, that proper service of said Affidavit and the Notice of Motion in connection therewith was made on Respondent, by service on the Attorney General of the State of New York and the Office of the District Attorney of Monroe County, and this matter having come on to be heard before this Court on Monday, April 1, 1974, and Petitioner having appeared in support of his motion by his said attorney, William H. Gardner, and Respondent having appeared in opposition thereto by Louis J. Lefkowitz, Attorney General of the State of New York (Bedros Odian, Assistant Attorney General, of counsel), and the Court having been advised that the District Attorney of Monroe County would not appear, but that the District Attorney had requested that the place of the trial of this matter be changed to Monroe County and that further time be granted for submission of opposition by the District Attorney and, further, that the Court direct the transfer of this matter to the State Court for further processing thereof, and the Court having had

due deliberation hereon and having considered the arguments of counsel and the prior proceedings herein.

Now, on motion of William H. Gardner, it is

ORDERED, that this matter continue to be processed by this Court and not be transferred to the State Court; and it is further

ORDERED, that the Respondent, Harold J. Smith, Superintendent, Attica Correctional Facility, Attica, New York, together with the District Attorney of Monroe County and any and all other state or county officials acting with or on behalf of the People of the State of New York in connection with the prosecution and continued incarceration of the Petitioner be, and they hereby are, directed to produce the following documents and to submit the following information in the manner set forth below:

(a) Any and all notes, documents, writings or other materials in the files of the Rochester Police Department, the Attorney General of the State of New York or the Monroe County District Attorney prepared by any police officer, agency or witness in or subsequent to 1968, regarding or relating to (in whole or in part) the preparation for trial of this matter against the Petitioner, including, without limitation, any and all notes regarding the lineup, regarding statements of witnesses, regarding the identity, addresses, description, location or other data as to the other participants in the lineup, or any names of other persons present at the lineup, including their current addresses or last known addresses;

(b) A statement of any and all documents, writings, papers or other materials previously in the custody of the Rochester Police Department, the Monroe County District Attorney's Office or the Office of the State Attorney General, which materials have heretofore been destroyed, including a statement as to the description of any such destroyed document, the contents thereof, to the extent presently known, the date of such destruction, the identity of the person making such destruction and the circumstances relating to the same;

and it is further

ORDERED, that the above information and documents be supplied no later than 21 days following the date of service of a certified copy of this Order on the Office of the Attorney General of the State of New York at Buffalo, New York, and, by mail, on the Office of the District Attorney of Monroe County, Rochester, New York; and it is further

ORDERED, that the said documents and information be supplied to the Clerk of this Court at United States Court House, Buffalo, New York, there to be held by him for examination by counsel for Petitioner and, at the conclusion of such examination, the documents to be returned by the Clerk to the party or parties submitting the same; and it is further

ORDERED, that the Court defers until a later time the determination whether the hearing of evidence on this matter shall be held by this Court at Buffalo or at Rochester.

DATED: April 12, 1974

John T. Curtin  
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U. S. D. J.

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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UNITED STATES ex rel. ALTON CANNON

-vs-

Civ- 1970-535

VINCENT R. MANCUSI, Warden, Attica  
State Prison, Attica, New York

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SIR: Take notice of an ORDER, of which the within is a copy,  
duly granted in the within entitled action on the 14th day of  
June, 1974, and entered in the Office of the  
Clerk of the United States District Court, Western District of  
New York, on the 14th day of June, 1974.

Dated: Buffalo, New York

June, 1974

JOHN K. ADAMS, Clerk  
U.S. District Court  
U.S. Courthouse  
Buffalo, New York 14202

TO: William H. Gardner, Esq. and  
Frederick A. Provorny, Esq.  
Attorney for Plaintiff

TO: Louis J. Lefkowitz, Esq.  
Attorney for Defendant

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel.  
ALTON CANNON,

Civ. 1970-535

Petitioner,

-vs-

ORDER

HAROLD J. SMITH, Superintendent,  
Attica Correctional Facility,  
Attica, New York,

Respondent:

On the motion of Petitioner herein, made by Notice of Motion, dated June 6, 1974, and by affidavits of William H. Gardner, sworn to June 6, 1974, and of Frederick A. Provorny, sworn to June 3, 1974, and Respondent having consented to the entry of this order in the terms hereinafter set forth, which consent is set forth at the foot hereof.

NOW, ON MOTION OF WILLIAM H. GARDNER, it is

ORDERED, THAT Respondent be and he hereby is prohibited from introducing into evidence in any further proceedings in this proceeding any documents or other materials referred to in the order of this Court, dated April 12, 1974, or the testimony of any witnesses whose names, identity, description and current or last-known addresses have not yet been submitted, in compliance with said Order, unless and except to the extent that such Order shall be complied with on or before July 1, 1974, at 10:00 A. M. on that day; and it is further

ORDERED, that the said motion, to the extent it requests the "setting [of] a prompt date for the final hearing herein and [the] granting [of] such other and further relief as to the Court may seem just and proper in the premises", be and the same hereby

is adjourned to Monday, July 1, 1974, at 10:00 A. M.

s/ John T. Cortin

U. S. D. J.

Consented to as to form  
and substance:

William H. Gardner

William H. Gardner

Bedros Odian

Bedros Odian  
for: Louis J. Lerkowitz,  
Attorney General

Melvin Bresler

Melvin Bresler  
Ass't District Attorney  
Monroe County

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA ex rel.  
ALTON CANNON,

Civ. 1970-535

Petitioner,

AFFIDAVIT

-vs-

HAROLD J. SMITH, Superintendent,  
Attica Correctional Facility,  
Attica, New York,

Respondent.

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STATE OF NEW YORK  
COUNTY OF MONROE SS:  
CITY OF ROCHESTER

MELVIN BRESSLER, being duly sworn, deposes and says:

1. I am an Assistant District Attorney in Monroe County, New York, and I have familiarized myself with the prior proceedings herein.

2. I make this Affidavit in response to the orders of this Court dated April 12, 1974, and June 6, 1974.

3. The people in the lineup on September 5, 1968, other than defendant, were:

Alfred Albert  
Willie V. Amos  
Thomas Tindal  
William Williams

I have no addresses for any of these people.

4. The officers in charge of the investigation were: George Reiss, Daniel Funk and William Mahoney. I have not talked to Captain Reiss or Lieutenant Funk and have no idea if they were present at the lineup or not. Detective Mahoney was at the lineup. Captain Reiss and Lieutenant Funk can be reached at:

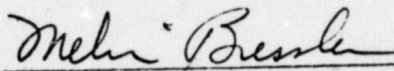
Rochester Police Department  
150 Plymouth Avenue South  
Rochester, New York 14614

Detective Supervisor William Mahoney can be reached in care of:

Monroe County Sheriff's Office  
130 Plymouth Avenue South  
Rochester, New York 14614

5. The files in this case in our office contain transcripts of the Preliminary Hearing, the statements made by defendant, the lineup list (referred to above), and, of course, the Grand Jury report and the indictments. Mr. Frederick Prevony, co-counsel herein, knew the contents of our files before the appeal to the Second Circuit in this case.

6. We have no control over the Attorney General's office but they had nothing to do with the prosecution of the case anyway. We similarly have no control over the closed files in the Police Department, but Detective Mahoney informs me that there is no file, and there is no way of knowing what the file contained if there ever was a file. By way of explanation, I should add that the Criminal Reports which were filed as part of the investigation in this case probably are available, since there would be no reason to destroy them. They are probably filed in the dead files either by their Criminal Report number or alphabetically by the name of the investigating officer that filed the report (s). These reports would precede the lineup, and I presume would be of no use to the defense.

  
Melvin Bréssler

Sworn to before me this  
28 day of June, 1974.

  
Notary Public  
COMMISSION EXPIRES: MARCH 30, 1975

**United States District Court**

FOR THE

WESTERN DISTRICT OF NEW YORK

US exrel ALTON CANNON

v.

VINCENT R. MANCUSI

No. Civ-1970-535

TAKE NOTICE that the above-entitled case has been set for HEARING at  
2:00PM , on July 12 , 1974 , at U. S. District  
Court, Buffalo, N.Y. before Hon. John T. Curtin.

Date July 1 , 19 74

JOHN K. ADAMS

Clerk.

By RICHARD R. WALSH

Deputy Clerk.

To WILLIAM H. GARDNER, Atty.  
1800 One M & T Plaza  
Buffalo, N.Y. 14203

MELVIN BRESSLER,  
Assistant District Attorney  
201 Hall of Justice  
Rochester, N.Y. 14614

Frederick A. Provorny, Atty.  
299 Park Ave.  
New York, N.Y. 10017

BEDROS ODIAN  
ASST. ATTORNEY GENERAL  
65 Court St.  
Buffalo, N.Y. 14202

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Index No. 75-2056

against

Plaintiff

Defendant

AFFIDAVIT OF SERVICE  
BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 651 Vanderbilt Street, Brooklyn, New York 11218.

That on June 13,  
brief and appendix for appellee  
on Jack B. Lazarus, Esq.

19 75 deponent served the annexed

~~attorney(s) for~~ District Attorney of Monroe County, 201 Hall of Justice,  
~~in this action at~~ Rochester, N.Y. 14614; Attn.: Melvin Bressler, Esq.  
the address designated by said attorney(s) for that purpose by depositing <sup>two</sup> true copies <sup>ies</sup> of same enclosed  
in a postpaid properly addressed wrapper, in ~~post office~~ official depository under the exclusive care  
and custody of the United States Postal Service within the State of New York.

Sworn to before me  
June 13, 1975.

*Joan Ann Annicaro*

JOAN ANN ANNICARO  
NOTARY PUBLIC, State of New York  
No. 52-0128463  
Qualified in Suffolk County  
Certificate filed in New York County  
Term Expires March 30, 1977

*Joseph H. Schnabel*  
The name signed must be printed beneath  
JOSEPH H. SCHNABEL